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# REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

January and June Terms, 1859.

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BY JOHN W. SHEPHERD,

STATE REPORTER.

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OFFICERS OF THE SUPREME COURT,  
DURING THE TIME OF THESE DECISIONS.

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HON. A. J. WALKER, CHIEF JUSTICE.  
HON. GEO. W. STONE, } ASSOCIATE JUSTICES.  
HON. R. W. WALKER, }

---

M. A. BALDWIN, ATTORNEY GENERAL.  
JOHN D. PHELAN, CLERK.  
JAMES S. ALBRIGHT, MARSHAL.



## ERRATA.

In *Dorman v. The State*, p. 224, 16th line from top, insert *of* after *reasoning*; p. 236, 11th line from top, for *legislation* read *legislature*; p. 238, 25th line from top, for *making* read *marking*; p. 243, 8th line from top, for *limitation* read *inhibition*. See 1st head-note corrected in index, p. 752

In *Ex parte* Bryant, p. 277, 21st line from top, for *on* read *of*.

In *McKellar v. Couch*, p. 349, at end of 10th line, insert *no*.

In *Ex parte* Lawrence, p. 454, 14th line from top, after *questions* insert *in the case*.

In *Ex parte* Beavers, p. 72, instead of WALKER, J. read A. J. WALKER, C. J.

In *Farmer v. Wilson*, p. 75, R. W. WALKER, J., having been of counsel, did not sit.

In *Shackelford v. Bullock*, p. 418, STONE, J., being related to one of the parties, did not sit.



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## RULES OF PRACTICE IN SUPREME COURT.

**RULE 31. *Abatement and revivor of suit.***—When the death of a party has been suggested, and an order made to revive in the name of or against the heirs or personal representative of the deceased, and this is not done by the next term of the court, the suit shall abate, unless, for sufficient cause shown, the court shall extend the time. (Adopted 9th March, 1859, in lieu of former Rule 31 adopted at January term, 1854.)

**RULE 33. *Failure to prosecute appeal.***—When an appeal has been taken, or shall be hereafter taken to this court, from any chancery, circuit, or probate court, or the city court of Mobile; and the term of this court to which such appeal is taken, shall close its sessions, or cease to hear arguments; if the record in such case shall not have been filed, and no order made in this court, either continuing said cause, or disposing of the same, it shall be the duty of the clerk of this court, at the request of any attorney thereof, to certify such failure to file the record, or to have such order made in the cause, to the register, clerk, or probate judge of the court from which it is represented that such appeal has been taken; and the certificate made pursuant to this rule shall be a full authority to the register, clerk, or probate judge, to proceed in said cause as if no appeal had been prosecuted. (Adopted at June term, 1860.)

**RULE 34. *Order of business.***—On Thursday of each week during term time, immediately after the motions and State cases have been disposed of, the cases of appeals from orders dissolving injunctions belonging to the division, and not previously disposed of, shall be called and stand for trial as preferred causes, in the order in which they stand on the docket. (Adopted at June term, 1860.)

## RULE OF CHANCERY PRACTICE,

ADOPTED APRIL 30, 1859.

Ordered by the court, that Rule 5, subdivision II, of the Rules of Chancery Practice adopted at this present term, be so amended as to read as follows:

II. After the allowance of an amendment to the bill, the complainant shall cause a notice that his bill has been amended to be served upon all defendants who shall have been served with summons to answer the original bill, and who were not in court, either in person, by solicitor, or guardian *ad litem*, at the allowance thereof; unless the defendant is a non-resident, in which event the court shall direct in what manner he shall be notified.

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
At January Term, 1859.

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BELCHER AND WIFE *vs.* SANDERS.

[BILL IN EQUITY TO ESTABLISH IMPLIED TRUST.]

1. *Trust implied and enforced against self-constituted agent and guardian.*—Where the defendant undertook to become the guardian of his infant sister-in-law, and to bid in for her, at the sale of the personal property belonging to the estate of her deceased father, certain slaves to which she had a family attachment; and, in pursuance of his promise, but before taking out letters of guardianship, bought the slaves at the sale, professedly for the infant, and thereby obtained them at an inadequate price,—*held*, that these facts establish a trust, at the election of the infant, which a court of equity will enforce in her favor.

APPEAL from the Chancery Court of Perry..

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by John Belcher and Susan, his wife, against Green B. Sanders; and sought to establish and enforce an implied trust, in favor of Mrs. Belcher, in certain slaves which the defendant had purchased at the sale of the personal property belonging to the estate of Lewis Abbott, deceased, who was the father of Mrs. Belcher, and the father-in-law of the defendant. The facts stated in the bill, as the ground of the relief prayed, are substantially as follows:

The complainants were married, in Perry county, Alabama, on the 18th December, 1856, when the complainant Susan was only about seventeen years of age. Lewis Abbott, her father, died in February, 1848, intestate, leaving a widow and fifteen children; five of his sons being at that time over twenty-one years of age. Mrs. Belcher lost her mother in infancy, and was consequently placed under the charge of a negro woman named Lizzy, belonging to her father, by whom she was nursed and tended with affectionate care. The two children of Lizzy, Martha and Amanda by name, thus became the playmates and companions of their young mistress, who conceived a strong attachment towards them and their mother. Her father, observing this attachment, declared that the two negro girls should belong to his said daughter, and should never be separated from her. In accordance with these declarations, he executed two wills, one in 1845, and the other in 1847, (neither of which could be found after his death,) in which he bequeathed said negroes to her; and the "negroes were known and called in the family as belonging to her." The defendant had married an elder sister of Mrs. Belcher, "a number of years before the death of their said father," and resided a few miles distant from him; "and said defendant well knew the wishes and intentions of her said father as above stated, and that said Martha and Amanda were known and called in the family as belonging to her."

The defendant, perceiving the anxiety of said Abbott about the welfare of his infant daughter Susan, or from some other cause unknown to the complainants, promised said Abbott that, in the event of the latter's death, he would raise and educate said Susan, free of charge; "and after the death of her father, it was understood by the defendant, and in the family of her deceased father, that the defendant was to become the guardian of the complainant Susan; and said defendant promised and agreed with her brothers, Daniel and George Abbott, that he would raise and educate her without charge; and this was known to her said brothers, before and at the time of the sale hereinafter mentioned." "Afterwards, to-wit,



on the 3d day of January, 1848, the defendant became the guardian of the complainant Susan, by regular appointment from the probate court of said county, and has ever since so continued to be."

On the 18th December, 1848, the administrator of said Abbott, obtained an order from the probate court for the sale of the personal property belonging to said estate; and proceeded to sell said property, under said order, on the 19th January, 1849. "Before said sale, said defendant agreed with said Daniel and George Abbott that, at said sale, he would buy said negroes Martha and Amanda for the complainant Susan, and would pay for them with her money; and declared before the said sale, in the presence and hearing of her brother Benjamin and others, that he was going to buy said negroes for her; and this intention of said defendant was generally known among the members of the family, especially among the complainant's older brothers, and, perhaps, to many others attending said sale; and when the said negroes were put up at the sale, it was understood that the defendant was to become the guardian of complainant Susan. The complainant's said brothers, knowing the circumstances beforementioned, and wishing that the intentions of their father should be carried out, were willing and desirous that said defendant should buy said negroes for her, and agreed with said defendant that he should buy them for her accordingly; and for like reasons the said administrator, and perhaps others, were unwilling to interpose. Therefore, when said negroes were put up for sale, at the time aforesaid, they were bid off by said defendant, at the sum of \$390 for Martha, and 400 for Amanda; sums below what said negroes would have brought, as complainants believe, but for the circumstances aforesaid. The said George and Daniel Abbott were present at said sale, and were ready, able and willing to bid off said negroes for said complainant, as was known to said defendant, and did not do so because of said understanding then existing between them and said defendant."

The defendant did not pay any money to the administrator on account of the purchase of said slaves, but, on

subsequent settlement between them, deducted from the distributive shares of his wife and ward the amount due on account of his purchase of said slaves and other property at the sale. On divers occasions after the sale, and in the presence of many different persons, he admitted that he had bought said slaves for the complainant, and had paid for them with her funds. The negroes have greatly increased in value, and are worth about \$2500. The defendant now refuses to deliver them to the complainants, and claims to hold them as his own property; and he has filed his accounts and vouchers for a settlement of his said guardianship, charging himself therein with the amount paid on the purchase of said slaves and interest.

The prayer of the bill was for the delivery of the negroes, an account of their hire, and general relief.

The chancellor sustained a demurrer to the bill, for want of equity; and his decree is now assigned as error.

I. W. GARROTT, for the appellants.—The case made by the bill is this: The defendant was the guardian of Mrs. Belcher, and undertook to purchase the slaves for her; before the sale he declared his intention to purchase them for her, and agreed with her brothers that he would do so; it was understood at the sale that such was his intention and purpose, and he was thereby enabled to bid them off at a less price than he would otherwise have been obliged to pay; he afterwards paid for them with her money, and repeatedly declared that he had bought them for her, and that they belonged to her. These facts established a clear case for equitable relief.—*Mosely v. Lane*, 27 Ala. 62; *Montgomery v. Givhan*, 24 Ala. 568; 2 My. & K. 664; *Kyle v. Barnett*, 17 Ala. 306; 2 Johns. Ch. 62; 1 Story's Equity, §§ 465, 468, 623; 5 Dana, 224; 8 Paige, 89; 2 Hill's Ch. 567; 2 Story's Eq. §§ 1210–12. Even if the defendant had not been appointed guardian at the time of the sale, yet, having assumed to act as guardian for her, he will be held to as strict an account as if he had been duly appointed.—4 Paige, 64; 5 B. Monroe, 362; *Bibb v. McKinley*, 9 Porter, 636.

WM. M. BROOKS, and JNO. F. VARY, *contra*.—The bill shows on its face that the date of the defendant's appointment as guardian is incorrectly stated, and that he was not in fact the complainant's guardian when he purchased the slaves; nor did he then occupy any other fiduciary relation towards her, or have any of her funds or property in his possession, or under his control. On the contrary, he made the purchase in his own name, and on his own credit; and, on subsequent settlement with the administrator, allowed him a credit for the amount of all the property bought at the sale on the distributive shares of his wife and ward. The payment of the money of the *cestui que trust*, before or at the time of the consummation of the purchase, is the foundation of a resulting trust. *Botsford v. Burr*, 2 John. Ch. 404; *Steere v. Steere*, 5 Johns. Ch. 19; *Moore v. Jackson*, 6 Cowen, 725; *Taliafero v. Taliafero*, 6 Ala. 404; *Foster v. Trustees, &c.*, 3 Ala. 302; *White & Tudor's Leading Cases in Equity*, 176-7, and authorities cited.

RICE, C. J.—“It is a settled principle of equity, that where a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account, and for his own benefit; and if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will, in equity, be considered as holding it in trust for his principal.” The agent for an infant child, although he may be but the self-constituted agent, “cannot be permitted to take to himself the entire property acquired by his agency, without liability to account for it. When he assumed the agency, he assumed its duties and responsibilities.” Where he assumes to act as the agent and protector of the rights of an infant, and, in that character, obtains property professedly for it, and for a less price than he otherwise would have had to pay for the property, he will be considered as holding the property in trust for the infant; subject to his reimbursement for any expenses actually incurred in obtaining the title, and, perhaps, to other equitable allowances.—*Sweet v. Jacocks*, 6 Paige,



355; Mosely v. Lane, 27 Ala. 62, and authorities there cited.

Upon the facts stated in the bill, the claim of Mrs. Belcher to the negroes is not strictly and technically a resulting trust; but it has in it the substantial equity of such a trust, and belongs to what Chancellor Kent calls "that mysterious class of trusts arising or resulting by implication of law," which the legislature have left undefined and untouched, and which are forced upon the conscience by the manifest justice of the case. The retention of the negroes by the defendant, (if the allegations of the bill are true,) under a claim that they belong to him, is a fraud, against which a court of equity not only has the power, but is bound to relieve, in order to prevent the grossest injustice. See the authorities cited in Mosely v. Lane, *supra*.

The chancellor erred in sustaining the demurrer to the bill, and dismissing it for want of equity. His decree is reversed, and the cause remanded.

NOTE BY REPORTER.—On a subsequent day of the term, (February 5th,) in response to an application by the appellee's counsel for a rehearing, the following opinion was delivered:

*Per curiam*.—We have carefully considered the petition for a rehearing in this case, and are unanimous in the opinion, that the same should be overruled. "If an agent, employed to purchase for another, purchases for himself, he will be considered the trustee of his employer."—See Lees v. Nuttall, 1 Russ. & My. 53; Taylor v. Salmon, 4 Myl. & Craig, 134, 139; Perkins v. Alexander, 1 Johns. Ch. 394.

There is a class of cases, where the right to real estate is in controversy, which hold that, when the agency relied on is in parol, and the agent, in disregard of his agreement, makes the purchase on his own account, the principal cannot have the agent declared his trustee.—See Bartlett v. Pickergill, 1 Eden, 515; 2 Sug. on Ven. 138, bottom page; Lenian v. Whitley, 4 Russ. 423. In these



cases, however, relief is denied, because there is no agreement or memorandum in writing to take the case out of the statute of frauds. They can have no application to personal property; and hence we need not announce our concurrence with, or dissent from, the principles announced in the cases cited *supra*.

---

## ALSTON vs. ALSTON.

## [BILL IN EQUITY FOR SETTLEMENT OF GUARDIANSHIP.]

1. *Failure to perfect service of amended bill.*—The failure to perfect service of an amended bill on one of the defendants, from whom an answer to such amendment was required, is an error which will work a reversal of the chancellor's decree, at the instance of the defendants, although the omission seems to have escaped the notice of the chancellor and counsel in the court below.
2. *Validity of guardian's bond.*—Prior to the passage of the act of 1843, (Clay's Digest, 272, § 26,) the orphans' court had no authority to appoint a guardian of a child who had a living father; consequently, a bond taken by that court, prior to the passage of the act of 1843, from a father who was appointed guardian of one of his infant children, is inoperative as a statutory bond; and to render it valid as a common-law bond, it must be supported by a consideration.
3. *Authority of guardian by nature.*—A father has no authority, as guardian by nature of his infant child, to receive money or slaves belonging to the child; and if he receives such money or slaves, the chancery court will interpose, on a proper application, and require him to give bond with surety for the faithful discharge of his duties as guardian.
4. *Consideration of common-law bond of guardian.*—If a father, having been appointed without authority guardian of his infant son, and having thereupon executed a bond for the faithful discharge of his duties as such guardian, by virtue of such bond receives money or property belonging to the child, which he would otherwise have had no authority to receive, this constitutes a sufficient consideration to support the bond at common law.
5. *Condition of guardian's bond.*—The fact that a guardian's bond is conditioned for his faithful performance of the "duties of guardian to the said ward," does not show that the guardianship is restricted to the person of the infant.
6. *Liability of guardian and his sureties.*—Where a guardian has received a legacy for his ward from the testator's executor, including a portion of the proceeds of a sale of lands by the executor, neither he nor his sureties can avoid liability therefor to the ward, by setting up the invalidity of the executor's appointment, or his want of authority to make the sale.

7. *Allowance to father out of child's estate for education and maintenance.*—As a general rule, the father is bound to support his minor children, if he is able to do so, although they may have property of their own ; but, where he is unable to maintain and educate them suitably to their fortune, the chancery court will, on a proper application, make an allowance to him out of their separate property, either for their future education and maintenance, or as a reimbursement to him for past maintenance ; and in determining the question of the father's ability, it is proper to consider the amount of his estate, the number of his children, the condition of his family, his expenses and income, and the amount of his children's fortune.
8. *When statute of limitations begins to run as between guardian and ward.*—The statute of limitations does not commence to run against a ward, seeking a settlement in equity of his guardian's accounts, until the termination of the guardianship.
9. *When cross bill is unnecessary.*—Under a bill for the settlement of a guardian's accounts, the defendants can obtain the benefit of credits and matters of discharge by answer ; consequently, a cross bill is unnecessary, and cannot be supported.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Nathaniel Y. Alston, against William J. Alston, his father, and the administrator of William Cade, deceased, who was his father's surety ; and sought a settlement and account of his father's guardianship. The property which went into the possession of said William J. Alston, as the guardian of said Nathaniel Y., consisted of slaves and money, and was bequeathed to said Nathaniel Y. by William B. Cade, his uncle, who died in Marengo county in March, 1835. The bequest to said Nathaniel Y. was a contingent remainder in certain lands and slaves, limited on the death without issue of Adolphus H. Cade, an infant son of the said testator, who died in July, 1835, without issue. The original bill alleged, that the will of said testator, William B. Cade, was admitted to probate by the orphans' court of said county, and that letters testamentary were granted by said court to Adolphus S. Cade, as sole executor ; but an amended bill was afterwards filed, alleging that these proceedings were had in the circuit court of said county, on account of the relationship and consequent incapacity of the judge of the orphans' court.

No administration was ever had on the estate of said

Adolphus H. Cade, the deceased infant; but the executor of said William B. Cade, having sold the lands, under an order of the orphans' court, proceeded to make a final settlement and distribution of the estate among the remainder-men and other persons in interest; the complainant's father, as his guardian, receiving his share of the slaves and proceeds of the sale of the lands, as hereinafter stated. The order for the sale of the lands was made on the petition of the executor, which was filed in said circuit court on the 30th March, 1837, and which alleged that the lands could not be equally, fairly and beneficially divided without a sale; but the order of sale was granted by said orphans' court, in December, 1838, after the matters connected with said estate had been transferred back to it.

On the 30th March, 1837, William J. Alston, as "natural guardian of his infant son," filed his petition in said circuit court; alleging that more than eighteen months had elapsed since the grant of letters testamentary to the executor of William B. Cade, and that his infant son, Nathaniel Y., was entitled to a portion of the estate under the provisions of the will; and praying that the slaves might be divided among the several persons in interest. On the 31st March, 1837, the day after this petition was filed, the circuit court made an order, appointing commissioners to divide the slaves among the several legatees, and directing the executor to "deliver to the several legatees, and to the guardians of such of them as are minors, their several distributive portions as allotted by said commissioners, upon their executing to him refunding bonds, with security, according to law;" and it was further ordered by the court, "that the guardians enter into bond and security with the clerk for their guardianship according to law." The bill alleged, that the circuit court, in granting this order, was exercising chancery jurisdiction; which allegation was denied by the answers.

On the 6th April, 1837, the executor delivered to said William J. Alston, as the guardian of his son, the slaves allotted to him by the commissioners, four in number. On the 10th April, 1837, said William J. applied to the



orphans' court of the county for letters of guardianship of his infant son, which were granted to him on the same day, and he thereupon entered into bond, with William Cade and Christopher H. Taylor as his sureties, payable to the judge of the county court, and conditioned as follows: "Now, if the said William J. Alston shall well and truly perform the duties of guardian to the said Nathaniel Y. Alston, his son, according to law, then the above obligation to be null and void." On the same day, the guardian returned to said orphans' court an inventory of the slaves which he had received from the executor, stating therein that he had received them as "natural guardian" of his son. Of the slaves thus received by said William J. Alston, one was sold by him in September, 1847, and the others, with their increase, were delivered to the complainant in November, 1850, after he had attained his majority. The bill sought to charge the defendants with the hire of all the slaves while they were in the guardian's possession, and with the value of the one which he had sold.

At the sale of the lands by the executor, above referred to, William J. Alston became the purchaser, and executed to the executor his notes for the purchase-money; but these notes were afterwards discharged, on settlement between him and the executor for the complainant's distributive share of the proceeds of the sale, by allowing the executor a credit for the amount due on them. The bill also sought to charge the defendants with this amount and interest, as for so much money received.

The original bill was filed on the 9th January, 1854. An amended bill was filed on the 13th March, 1854, and a second amendment on the 29th March, 1855. The defendants were required to answer the second amendment; but the record does not show that notice or service of it was ever perfected on William J. Alston, nor did he file an answer to it. Christopher H. Taylor, one of the sureties on said William J. Alston's bond as guardian, was alleged to be a non-resident, having no property or effects within this State, and was not made a party to the bill. William Cade, the other surety, was alleged to be

dead; and William C. Thompson, as his executor, was made a defendant.

Separate answers were filed by the two defendants, one on the 29th, and the other on the 30th March, 1854, each setting up substantially the same matters of defense. They insisted that the bond was void, because the orphans' court had no jurisdiction to take it; that the slaves went into the possession of William J. Alston, as guardian by nature only, and not under his appointment by the orphans' court; that the grant of letters testamentary to the executor was also void for want of jurisdiction in the court by which they were issued; that the order for the sale of the lands was void for the same reason, and that the sale did not divest the title of the devisees. They further alleged, that William J. Alston, with whom the complainant resided during his minority, and by whom he was supported and educated, was, for many years, greatly embarrassed in his pecuniary circumstances, with a large family dependent on him for their support, and, from these and other circumstances, was unable to maintain and educate the complainant in a manner suitable to his fortune; and they insisted that, in view of these facts, the said William J. was entitled to reimbursement out of the complainant's estate for the expenses incurred in his maintenance and education. They pleaded the statute of limitations, and demurred to the bill for want of equity.

On the death of William C. Thompson, the executor of William Cade, the suit was revived against N. B. Lesueur, as the administrator *de bonis non* of said Cade. The said administrator filed an answer, and afterwards a cross bill, setting up in each the same matters of defense which his predecessor had relied on in his answer.

On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, dismissed the cross bill, and ordered a reference and account; instructing the master not to allow the guardian any sum for the maintenance and education of the complainant during minority, and to charge him with the complainant's portion of the proceeds of the sale of the lands.

The chancellor's decree is now assigned as error.

I. W. GARROTT, and F. W. SIDDOXS, for the appellants, made the following points:

1. The cause was not at issue on the final hearing, because service of the amended bill, filed the 29th March, 1855, had not been perfected on the defendant Alston, nor had he voluntarily appeared and answered it. This error must work a reversal of the chancellor's decree.

2. The bond of William J. Alston, executed on the 10th April, 1837, is void as a statutory bond, because at that time the orphans' court had no power to appoint a father guardian of his own son.—Hall v. Lay, 2 Ala. 529; Wood v. Wood, 3 Ala. 756; Lang v. Pettus, 11 Ala. 37; Poston v. Young, 7 J. J. Mar. 501.

3. The said bond has no validity as a common-law obligation, because it is not supported by a consideration. The appointment as guardian by the orphans' court, being void, cannot constitute a valid consideration for the bond. The bond was executed four days after the negroes were delivered to the defendant Alston; the negroes were delivered to him "as natural guardian" of his son; and it is not shown that he ever received any money or property of his ward by virtue of the bond.

4. The proceedings had in the circuit court, in the matter of the application by the defendant Alston for his son's distributive share of the slaves, cannot aid the bond. The record does not show that, in this matter, the circuit court was exercising chancery jurisdiction; and that fact cannot be assumed. If the proceeding was in chancery, it should have been commenced by bill.—3 Dan. Ch. Pr. 2076. But, even if the court acquired jurisdiction to make the order, the bond shows on its face that it was not given pursuant to the order, because it does not comply with the terms of the order.

5. The condition of the bond shows, that the defendant Alston was appointed guardian, not of the estate, but of the person of his son; consequently, the bond imposes no obligation on him or his surety in reference to the ward's estate.—2 Kent's Com. 227; Grimes v. Commonwealth, 4 Litt. 6, note, and cases therein cited; 2 Caines' Cases, 29, 57.



6. If the bond be valid for any purpose, it is a mere contract, under seal, between the parties thereto, and liable to the bar of the statute of limitations, which was complete before the filing of the bill.

7. The circuit court had no jurisdiction, in 1835, to admit to probate the will of William B. Cade, or to grant letters testamentary to his executor. This jurisdiction was then confided solely to the orphans' courts of the several counties, and the only exception in the statute was in reference to "settlements" by executors, administrators and guardians. Consequently, the sale of the lands by the executor, under the order of the orphans' court, which was granted on the application of the executor, was wholly void, and did not divest the title of the devisees. The record shows that the land was bought by defendant Alston, but no money was ever paid for it. The complainant is thus attempting to hold the surety of his guardian liable for the proceeds of the sale of this land, when the title to the land is still in himself, and no money has ever been paid or received on account of it.

8. Conceding that the bond is valid, and that it includes the infant's estate, it would only bind the obligors for the rents and profits of the lands. The guardian could not sell the infant's lands, even with the aid of the orphans' court, for any other purpose than to maintain the infant; and the parties could not have contemplated a change of the lands into money when they entered into the bond. *Irvine v. McDowell*, 4 Dana, 629; *Grimes v. Commonwealth*, 4 Litt. 1, and cases cited in note; 3 Humph. 592, 595; 5 Indiana, 350.

9. On the facts stated in the answers and proved, the defendant Alston was entitled to an allowance out of the complainant's estate, for his support, maintenance and education. A court of equity, on a proper application, would have granted such an allowance; and it will grant reimbursement for past maintenance whenever it would have authorized it in advance.—*McPherson on Infants*, 151; *Patton v. Patton*, 3 B. Monroe, 161; 5 Vesey, 194; 9 Vesey, 285; 14 Vesey, 449; 5 Vesey, 197; 3 Vesey, 10, 60; 5 Ala. 312; 5 Dana, 593; *Hill on Trustees*, 600.

WILLIAM M. BROOKS, and WILLIAM E. CLARKE, *contra*.

1. Formal objections, which, if they had been raised in the court below, might have been there remedied, are not available on error.—Johnson v. Culbreath, 19 Ala 348; Walker and Wife v. Smith, 28 Ala. 569; Holston v. Holston, 23 Ala. 777.

2. The failure to perfect service of the amended bill on the defendant Alston, is not available on error to his co-defendant, who voluntarily appeared and answered it without objection.

3. Although the orphans' court had no authority to appoint William J. Alston guardian of his infant son; yet the bond executed by him and his sureties, for the faithful performance of his duties as such guardian, is not void, but may be enforced in equity against him and his sureties, although the infant was no party to it.—Edmonds v. Morrison, 5 Dana, 224. But the fact that the bond is only valid as a common-law obligation, affects the remedy merely: the bond was conditioned for the discharge of the guardian's duties "according to law," and those duties and obligations are to be ascertained by reference to the statutes then of force.

4. The complainant's infancy would prevent the bar of the statute of limitations, if the statute were applicable to such a bond.

5. The evidence does not show that the negroes went into the guardian's possession before the execution of the bond; but, if such were the fact, it could not affect the validity of the bond, since he continued in the possession and use of the negroes, and received the profits thereof, for several years after the bond was made.

6. The validity of the executor's appointment, and of the sale of the lands, does not affect the question of the defendants' liability on their bond. The sale was made many years ago, and all parties interested have acquiesced in it. The defendants are not in a situation to insist on the invalidity of the sale. The claiming of the money by the complainant operates as a ratification of the sale, and the defendants are estopped from alleging that it was unauthorized.

7. The defendants do not show a state of facts entitling them to charge the complainant with his board and maintenance during infancy.—16 Ala. 737.

A. J. WALKER, C. J.—The decree of the court below must be reversed, because one of the defendants had never been served with any notice of, or subpoena to answer, a material amendment to which an answer by such defendant was required.

The fault for which we decide to reverse the case, seems not to have been observed by the chancellor or the counsel in the court below; and now, for the guidance of the chancery court in its future proceedings, we proceed to consider the questions reaching the merits of the case, which were decided by the chancellor, and, we suppose, discussed before him.

[2.] The most important question of the case is, whether the bond of Wm. J. Alston, as guardian of his infant son, given on the 10th April, 1837, is valid. In 1843, an act was passed, authorizing the appointment of guardians of the estates of infants, having living fathers. Clay's Digest, 272, § 26. Until that act was passed, the law of this State, as ascertained by the decisions of this court, denied to the orphans' court authority to appoint a guardian for the infant child of a living father.—Hall v. Lay, 2 Ala. 529; Wood v. Wood, 3 Ala. 756; Lang v. Pettus, 11 Ala. 37; Boyd v. Isaacs, 5 Porter, 388; Poston v. Young, 7 J. J. Mar. 501; Edmonds v. Morrison, 5 Dana, 223. Without renewing the discussion of the points involved in the decisions of this court above cited, we concede, as does the counsel for the appellee, so much of the argument for the appellants as assumes the invalidity of the appointment of Wm. J. Alston as the guardian of his infant son, by the orphans' court in 1837. From this concession it is a sequence, that we must regard the bond as taken by the orphans' court without authority, and inoperative as a statutory bond.

To render the bond valid as a common-law bond, it is requisite that it should be supported by a consideration. Sewall v. Franklin, 2 P. 493; Hester v. Keith, 1 Ala. 316;



Whitsett v. Womack, 8 Ala. 466; Gayle v. Martin, 3 Ala. 593.

[3.] If Wm. J. Alston has, by virtue of the execution of the bond, acquired no rights, and assumed or executed no trusts upon the strength of the bond, then the bond is without consideration. To determine whether the guardian has performed functions and exercised trusts by virtue of the execution of the bond, it is necessary to inquire what rights and what authority he had aside from those exercised by virtue of the bond. He was already the guardian by nature of his ward; but that guardianship, of itself, gave him no right to receive the slaves or money belonging to his ward; and a payment of the money or delivery of the slaves to him by the executor, without the execution of a suitable bond under the direction of the chancery court, would have been no discharge to the executor.—See the decision in Lang v. Pettus, 11 Ala. 37; Capel v. McMillan, 8 Porter, 198. It is but a legitimate amplification of the principle laid down in Lang v. Pettus, *supra*, that if an executor should make an unauthorized payment of money or delivery of slaves to the natural guardian, in the absence of a suitable bond for the protection of the ward, the chancery court would, upon application, require the execution of a bond with surety by the guardian. It follows from these principles, that the father of the complainant, as guardian by nature, had no right to receive his son's slaves or money, until a bond with surety had been given for the faithful discharge of his duties as guardian, and if he had received such money or property, the chancery court would at any time have interposed and exacted such bond with surety.

[4.] The circuit court, which, in 1837, exercised chancery jurisdiction in this State, in the order directing a division of the slaves among the legatees, of whom complainant was one, required that the guardians of the minor legatees should execute bonds with surety "for their guardianship according to law." The bond in controversy was given within a short time after that order.

The father of the complainant received money, and exercised the functions of a guardianship as to slaves.

He could only have been authorized to do so upon the execution of bond with surety. The bond, which he did execute, being precisely such a one as the law would have required, must be regarded as supported by a consideration. In the case of *Edmonds v. Harrison*, 5 Dana, 223, a question identical with that which we have been considering, was decided; and the bond was held to be supported by a consideration, and to be valid as a common-law bond. That decision is in harmony with the principles which have been applied in other cases, where the validity of other judicial bonds voluntarily executed has been passed upon. *Thomas v. White*, 12 Mass. 368; *United States v. Trigey*, 5 Peters, 115; *United States v. Maurice*, 2 Brock. 96; *Crawford v. Stephens*, 1 Kelly, 574; S. C., 3 Kelly, 499; *Crawford v. Howard*, 9 Geo. 314; *Iredell v. Barbee*, 9 Iredell, (N. C.) 258.

[5.] The bond given by Wm. J. Alston was conditioned, that he should "well and truly perform the duties of guardian to the said Nathaniel Y. Alston, his son, according to law." It is contended, that the undertaking of the obligors for the discharge of the duties of a guardianship "to" the ward has reference alone to a guardianship of the person. We do not so interpret the language. A guardianship "to" the ward can be restricted to a guardianship of the person, with no more reason than a guardianship "of" the ward. Guardianship "of" the ward is, no doubt, the more accurate expression; but, when understood in their ordinary acceptation, the expressions are not distinguishable in their meaning. Guardianship "of" the ward would not be limited in its meaning to guardianship of the person, and for the same reason guardianship to the ward should not be so limited. To construe the bond as pertaining to a guardianship of the person, would allow it no effect, and would make the act of giving it vain and useless. To construe it as securing the faithful discharge of the duties of a guardianship of the estate of the ward, gives it effect, and concedes to it a purpose.

[6.] If it be conceded, that the appointment of the executor, from whom the complainant's guardian received

his legacy, was void; and that the order for the sale of the land by the executor was also void, the liability of the guardian and his sureties will remain unaffected. For it was as much the duty of the complainant's guardian to demand and receive the complainant's legacy from an executor *de son tort*, as from a rightful and legally appointed executor; and although the sale of the land by the executor may have been unauthorized, yet it would be competent for the complainant to ratify the sale, and to take his proper share of its proceeds. So, it would be competent for him to approve the act of his guardian in taking his proper share of the proceeds of the sale, and to charge him and his sureties therewith. The guardian having received the money for his ward, and as belonging to his ward, it does not lie in his mouth to say that the sale from which the money arose was void, if the ward ratifies such sale. If the guardian has wrongfully taken up his own debt, instead of collecting money properly coming to his ward, he thereby misappropriates that amount of his ward's estate, and becomes liable therefor.

[7.] The answer of Thompson, the executor of Wm. Cade, (the surety of Wm. J. Alston,) alleges that Wm. J. Alston had six children, besides complainant, and a wife; that his wife was sick for many years; that her sickness rendered it necessary that she should be carried by her husband to Philadelphia, Lexington, and Louisville, and other places; that great expenses, absences from home, and neglect of business, deficient crops, serious embarrassment, and inadequacy of income to meet expenses, resulted; and that situated as he was, Wm. J. could not support and educate his other children, in a manner equal to that in which the estate of the complainant, without aid from his father, would have justified complainant's being supported and educated. William J. has become, and is now, unable to pay his debts, and is insolvent; a large portion of the indebtedness existing from about and before the time he obtained the property of complainant. The subsequent answer of Lesueur, the administrator *de bonis non* of the estate of Wm. Cade,



and the answer of Wm. J. Alston, are substantially the same on this point.

It is a general rule of law, that the father is bound to support his minor children, if able to do so, even though they have property of their own.—2 Kent's Com. 191; 2 Story's Eq. Jur. § 1354; *Pharis v. Leachman*, 20 Ala. 685; *Bethea v. McCall*, 5 Ala. 308. If the father is unable to maintain his infant child, having an independent estate, the chancery court will, upon an application by the father, make an allowance to him for the maintenance of such infant.—*Watts v. Steele*, 19 Ala. 656; *Osborn v. Van Horn*, 2 Florida, 360; In the matter of *Burk*, 4 Sanf. Ch. Rep. 617.

The court of chancery does not confine itself to the making of an allowance for a prospective maintenance, but will, in a proper case, allow a reimbursement to the father for the past maintenance of the infant.—*Stewart v. Lewis*, 16 Ala. 734; *Montgomery v. Givhan*, 24 Ala. 568—588; *Osborn v. Van Horn*, *supra*; *Patton v. Patton*, 3 B. Monroe, 160; *Heysham v. Heysham*, 1 Cox, 178; *Hughes v. Hughes*, 1 Brown's C. C. 387; *Andrews v. Partington*, 3 *ib.* 60; *Greenwell v. Greenwell*, 3 Vesey, 194; *Reeves v. Brymer*, 6 Vesey, 425; *Sisson v. Shaw*, 9 Vesey, 285; *Maberly v. Turton*, 14 Vesey, 499; *Ex parte Bond*, 2 Myl. & K. 439; *Clay v. Pennington*, 8 Simons, 359. Reason suggests, as the criterion for determining when an allowance for past maintenance should be made, the inquiry, whether a chancery court would have authorized it in advance. If, then, a father was unable to make the contribution to the maintenance of his infant child, at the time when it was made, the chancery court will reimburse him.

We thus reduce the question of Wm. J. Alston's right to a credit for the maintenance and education of the complainant to this: was he able to maintain and educate him as he did? To determine this question, it is necessary to inquire what is meant by ability to maintain the infant.

In *Watts v. Steele*, 19 Ala. 658, this court said, that the making an allowance to the father does not depend

upon his insolvency, but upon his inability to (support and) educate the child suitable to his fortune; that the father's ability was to be estimated comparatively; that his income, the size of the family dependent on him for support, his physical inability, from disease, &c., to exert himself, should be taken into the estimate; and that if, in view of these circumstances, it should appear to be reasonable to make an allowance, and for the benefit of an infant, the court should order it. Upon that authority, as well as upon those cited below, we conclude that, in determining the question of the father's ability to maintain and educate his son, it is proper to consider the amount of his estate, his income, the number of other children dependent upon him, his expenses, the loss of time and money, and the expenses growing out of proper efforts to restore or alleviate the affliction of his wife, and the amount of the son's fortune.—Macpherson on Infants, 222, 223, (41 Law Library, 151–152;) Hoste v. Pratt, 3 Vesey, 730; Allen v. Coster, 1 Beavan, 204; In the matter of Burk, 4 Sandford's Ch. 617; 2 Lead. Cases in Eq. (2 part,) 171; *In re Stables*, 13 Eng. Law and Eq. 61; Osborn v. Van Horn, *supra*; Myers v. Myers, 2 McCord's Ch. 255; Dupont v. Johnson, 1 Bailey's Eq. 281.

The answers show that the parent guardian in this case was pecuniarily embarrassed during the guardianship; that debts, existing at the commencement of the guardianship, continued in some form during its entire duration; that shortly after the guardianship terminated, the guardian became insolvent; that his income was unequal to his expenses; that the protracted illness of his wife produced great expense and loss of time, and consequent diminution of income as compared with the outlay; that he had six other children to be reared and educated; that he was unable to educate and maintain his children in a style comporting with the complainant's fortune; that he has endeavored to support and educate the complainant in a manner suitable to his degree and condition in life; and it appears from the bill itself that the complainant had a very considerable fortune independent of his father. The answers being such, and the proof conducing to

support the answer, the chancellor should not, by his decree, have denied all compensation for the past maintenance and education of the complainant, but should have referred it to the register to inquire and report whether the guardian should, upon the principles hereinabove laid down, receive any allowance for the past maintenance and education of his son.

[8.] The statute of limitations could not commence running against the complainant, until the termination of the guardianship.—Taylor and Wife v. Kilgore, 33 Ala. 214; Eiland v. Chandler, 8 Ala. 781.

The appropriation of his ward's slaves to his own use by the guardian was without any adequate excuse, apparent either from the allegations of the bill, or from the proof; and he was, therefore, properly charged with their hire.

[9.] The cross bill asked for no relief to which the complainant was entitled, that could not be procured under the answer. The chancellor did not, therefore, err in dismissing it. Cross bills are not necessary for the obtainment of credits, or mere matters of discharge. Goodwin v. McGhee, 15 Ala. 233.

For the errors pointed out, the chancellor's decree is reversed, and the cause remanded, for further proceedings in pursuance to the foregoing opinion.

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UNDERWOOD vs. SCHOOL TOWNSHIP 16,  
RANGE 27.

[SUMMARY PROCEEDING AGAINST DEFAULTING SCHOOL SUPERINTENDENT.]

1. *Summary proceeding not sustained.*—The 6th section of the 4th article of the school-law of 1856, (Session Acts 1855-6, p. 44,) which provides that, if a county superintendent fails to pay over according to law the money in his hands, "he shall be liable to the penalties set forth in section 382 of the Code of Alabama against treasurers who fail to pay over school-funds," does not authorize a summary remedy against him and the sureties on his bond.



2. *Rights and duties of trustees.*—The 5th section of the 4th article of said act, requiring the county superintendent to pay over the funds in his hands on the application of the trustees, “*provided they have discharged the duties, and at the time appointed, as prescribed in article 2, section 13, and not otherwise,*” imposes no disability on trustees who have duly discharged all their duties, on account of the failure of their predecessors to comply with all the requirements of the law.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS proceeding was commenced by notice and motion for a summary judgment, against William J. Underwood, and the sureties on his official bond, as school superintendent of the county of Russell, on account of his failure to pay over to the trustees of the township, on their demand, a balance of \$261 14 of the funds in his hands to which the township was entitled. The defendants moved to dismiss the proceeding, “on the ground that there was no law authorizing the same,” and reserved an exception to the overruling of their motion.

The material facts disclosed on the trial, as stated in the bill of exceptions, are these: Said William J. Underwood was duly elected county superintendent on the 5th May, 1856, but failed to give bond as required by law; and having been then appointed by the probate judge to fill the vacancy in the office, he gave bond on the 11th August, 1856, with the other defendants as his sureties; the condition of the bond reciting these facts. No election for trustees of the township was held on the second Monday in May, 1856, the time appointed by law for said election to take place; and the said Underwood, as county superintendent, thereupon appointed three trustees, all of whom, however, refused to act. In April, 1857, Underwood was required, on the petition of his sureties, to give a new bond, which he refused to do, but resigned his office; and one L. W. Martin was then appointed by the probate judge to fill the office for the unexpired term. Said Martin afterwards appointed three trustees for the township, who, on the 29th September, 1857, returned to him a report showing the number of children in the township, and, in January, 1858, (prior to the 15th day of the

month,) another report showing the "school operations" of the township for the year 1857. In February, 1858, these trustees demanded of said Underwood the balance of the funds in his hands belonging to the township, which he had received from the tax-collector of the county, in November, 1856; and he failed to pay it over to them. On these facts, the court rendered judgment against the defendants; to which decision they reserved an exception.

The rendition of judgment against the defendants, the overruling of their motion to dismiss the proceeding, and several rulings of the court on questions of evidence, are now assigned as error.

CLOPTON & LIGON, for the appellants.—1. There is no express statutory provision authorizing a summary remedy in such a case as this, and the proviso to the 6th section of the 4th article of the school-law of 1856, making a defaulting superintendent liable "to the *penalties* set forth in section 382 of the Code," &c., does not give a summary remedy.—Sample v. Royall, 4 Ala. 344.

2. The 5th section of the 4th article of said law requires the county superintendent to pay over funds on the application of the trustees, "provided they have discharged the duties, and at the times appointed," &c., "and not otherwise." These duties and times, as specified in the 13th section, are—1st, to make a report of the number of children, &c., during the month of September of each year; and, 2d, to make a report of school operations by the 15th January of each year. Unless these duties were performed by the trustees at the time specified, the superintendent is not authorized to pay over money to them, nor would a payment to them discharge him from liability. The money here sued for is a balance due for the year 1856, which the trustees were not entitled to demand in 1858, because no report whatever had been made for the year 1856.—8 Porter, 104; 9 Porter, 423.

L. W. MARTIN, with WM. P. & T. G. CHILTON, *contra*.  
1. Liability to a statutory *penalty* includes liability to the

remedy by which that penalty is enforced, as is shown by the very case cited by the appellants' counsel. This construction of the statute accords with public policy, as well as with the clear intention of the legislature.

2. The failure of the trustees of 1856 to perform their duties can impose no disabilities on the trustees of 1857, who have duly complied with all the requirements of the law.

STONE, J.—Section 6, article IV, of the act “to render more efficient the system of free public schools in the State of Alabama,” (Pamph. Acts of 1855–6, p. 44,) reads as follows: “That the county superintendent must promptly pay over the money in his hands, according to the provisions of this act; and, failing to do so, he shall be liable to the penalties set forth in section 382 of the Code of Alabama, against treasurers who fail to pay over school funds.”

Under this section, we are asked to sanction the application of a *summary remedy* against the superintendent and his *sureties*, on his bond. The word *penalties* is not comprehensive enough to embrace the *measure* of recovery, the *form* of proceeding for its enforcement, and *persons* not otherwise named, against whom to render the judgment. It certainly could not be successfully asserted, that a summary remedy, and that against sureties, is furnished by the words, “*he shall be liable to the penalties.*”

What we have said above is decisive of this proceeding.

[2.] In a future suit it may become a material inquiry, whether a performance by the trustees, of all the duties enjoined by section 13, article II, of the act we are considering, is a condition precedent to their right to proceed against a county superintendent under section 6, article IV. There is nothing in the language of section 5, article IV, which makes the right of trustees to demand and receive moneys due to their township to depend on the performance of duties anterior to the date of their appointment. Without announcing at this time what would be our decision, if trustees failed for a time to perform the duties enjoined upon them, and afterwards



did comply with the requirements of section 13, article II, it is obvious that, if trustees, from and after their election or appointment, *discharge their duties, and at the time appointed*, section 5 of article IV imposes no disabilities on them. We have laid down this rule, because cases may arise where there is a temporary vacancy in the office of trustee, or the acting trustees may be derelict in duty. Such vacancy or dereliction can oppose no obstacle to subsequent trustees, who *discharge* their duties. From the facts recited, we suppose this principle is applicable to the default here complained of.

Judgment of the circuit court reversed, and the cause remanded.

## JEMISON, FICKLIN & CO. vs. MINOR & BIZZELL.

[ACTION AGAINST PARTNERSHIP FOR LOSS OF HIRED HORSE.]

1. *Competency of partner as witness.*—In an action against a partnership, by its firm name, (Code, § 2142,) to recover damages for the loss of a hired horse, a partner in the firm to which the horse was hired is not a competent witness for the defendants, to show that they did not transact business under the name by which they were sued.
2. *Declarations of partner admissible against partnership.*—The declarations or admissions of one partner, in the course of the partnership business, tending to show a recognition by the partnership of the firm name by which it is sued, are admissible evidence against the partnership.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. WM. S. MUDD.

The complaint in this case was in these words :

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| <p>“Minor &amp; Bizzell<br/>vs.<br/>Jemison, Ficklin &amp; Co.</p> | } | <p>The plaintiffs claim of the<br/>defendants \$250 as damages, the<br/>value of a horse, property of<br/>plaintiffs, killed and destroyed on the — day of —, 1856,<br/>by their agent or servant, while pursuing and acting in</p> |
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the usual and ordinary business and employment of said defendants. The plaintiffs claim of the defendants, also, the further sum of \$250 as damages, the value of a horse, property of plaintiffs, which the said defendants hired of them, and which died of injuries inflicted on the — day of —, 1856, caused by reason of the negligence, want of care or skill on the part of the defendants' agent or servant, while using the same, in the ordinary business and employment of the defendants."

The defendants interposed the following pleas:

"1. For answer to the first count in the complaint, defendants say *actio non*, because they say it is not true that a horse, the property of the plaintiffs, was killed and destroyed on the — day of — 1856, by the agent or servant of the defendants, while pursuing and acting in the usual and ordinary business and employment of the defendants, as alleged and specified in said complaint. 2. For answer to the second count in said complaint, defendants say *actio non*, because they say it is not true that a horse, the property of plaintiffs, died of injuries inflicted on the — day of —, 1856, caused by reason of the negligence, want of care or skill, on the part of the defendants' agent or servant, while using the same, in the ordinary business and employment of said defendants, as alleged and specified in said complaint. 3. For further answer to said complaint, defendants say *actio non*, because they say they had no agent or servant, who was authorized by them to take, use or procure the plaintiffs' horse, at the time alleged in said complaint, in the ordinary business and employment of said defendants, or for any other cause or purpose; nor was plaintiffs' horse at any time injured or destroyed in any manner by the defendants, their agent or servant."

On the trial, the following exceptions were reserved by the defendants to the rulings of the court:

"On the trial of this cause, the plaintiffs introduced evidence tending to show that, in February, 1856, and for some months prior thereto, certain persons owned and were engaged in running a stage-line, for the transportation of the mail and the conveyance of passengers, on

the route between Columbus, Mississippi, and Selma, Alabama, through the town of Eutaw; that plaintiffs hired a horse to said persons, through their agent, to be worked in the stage, and to be used and employed on said stage-line; that said horse, while so used, worked and employed by them, received injuries which caused his death, to recover for which injuries and loss this suit is brought; that at the time of the hiring of said horse, and of the injury and loss complained of, the persons who owned and ran said line of stages, and whose agent hired said horse, did business under the firm name of Jemison, Ficklin & Co., and also under the firm name of Jemison, Ficklin & Powell; and that they acted, and were as well known by one of said firm names as by the other. The defendants then offered evidence tending to show that, prior to July, 1855, two lines of stages were run on said route between Columbus and Selma; that one of said lines was owned and run by Robert Jemison, Doughton Ficklin, Benjamin F. Ficklin, and Green T. Hill, doing business under the firm name of Jemison, Ficklin & Co.; that the other line was owned and run by Jas. R. Powell and others, doing business under the firm name of J. R. Powell & Co.; that these two firms united about the 1st July, 1855, and a new firm was formed, composed of Robert Jemison, Doughton Ficklin, Benjamin F. Ficklin, Green T. Hill, James R. Powell, George R. Timberlake, and F. C. Taylor, taking the firm name of Jemison, Ficklin & Powell; that one of said stage-lines ceased on the formation of said new firm, and only one line has been in operation on said route from that time to the present, employing the same stages, horses, &c., that had previously been employed by said two firms. After this evidence on the part of the defendants [had been introduced], the plaintiffs offered one Spencer as a witness, and proposed to prove by him that, subsequent to July, 1855, and during that year, as well as during a part of the year 1856, he did blacksmith-work on the stages, and shod horses employed on said stage-line; that he charged the work done by him to Jemison, Ficklin & Co.; that he repeatedly presented his accounts, for work done



during that period, charged to Jemison, Ficklin & Co.; and that said accounts were settled by said Benjamin F. Ficklin, without any objection on his part that the work had been improperly charged, or the accounts improperly made out. The defendants objected to the introduction of this evidence, and, their objection being overruled by the court, excepted. The defendants also moved to exclude said evidence from the consideration of the jury, and excepted to the overruling of their motion.

“The defendants offered F. C. Taylor as a witness, who is above mentioned as one of the persons composing the firm of Jemison, Ficklin & Powell, and proposed to prove by him, that he was a member of the firm of Jemison, Ficklin & Powell; that said firm was composed of Robert Jemison, Doughton Ficklin, Benjamin F. Ficklin, Green T. Hill, James R. Powell, George R. Timberlake, and himself, said Taylor; that plaintiffs’ horse was being worked by said firm of Jemison, Ficklin & Powell at the time he was injured, and was procured for their use and service from plaintiffs, and was not hired by the defendants, Jemison, Ficklin & Co., nor to be used by them; that the firm of Jemison, Ficklin & Co. was composed of Robert Jemison, Doughton Ficklin, Benjamin F. Ficklin and Green T. Hill, and had previously sold out to Jemison, Ficklin & Powell; and that he (witness) had never been a member of the firm of Jemison, Ficklin & Co. To the introduction of said Taylor as a witness, for the purposes aforesaid, the plaintiffs objected, and the court sustained their objection; to which ruling of the court, refusing to permit said witness to testify, the defendants excepted.”

These two rulings of the court are now assigned as error.

J. D. WEBB & INGE, for the appellants.

JNO. G. PIERCE, *contra*.

R. W. WALKER, J.—1. The evidence tended to show, that the plaintiffs’ horse was hired to certain persons, who were engaged in running a line of stages between Columbus and Selma; and that, in consequence of the neglect

of their servant, he was lost. The suit was against "Jemison, Ficklin & Co.," and was brought under section 2142 of the Code; the individuals composing the firm not being named either in the summons or complaint. Hence, in order to a recovery, it was essential that the plaintiff should prove that the persons who were his bailees, and by the negligence of whose servant his horse had been lost, transacted business under the common name of Jemison, Ficklin & Co. The plaintiff's evidence tended to establish that fact. On the other hand, evidence was introduced by the defendants, which tended to show that the true and only firm name of the persons who were engaged in running that line of stages was "Jemison, Ficklin & Powell." It is to be gathered from the bill of exceptions, that one of the disputed points in the court below was, whether the bailees of the plaintiffs, who were the owners of the stage-line referred to, did in fact transact business under the name of Jemison, Ficklin & Co. If they did, F. C. Taylor, who, it is shown, was one of the persons engaged in running that line of stages, was a party to the suit, and would have been directly affected by the judgment. Inasmuch as there was some evidence tending to show that the plaintiffs' bailees did transact business under the name of Jemison, Ficklin & Co., and as, upon that hypothesis, a judgment in favor of the plaintiff would bind property in which Taylor had a partner's interest, we cannot see how the latter can be considered a competent witness for the purposes for which he was offered by the defendants. Considering the case in the aspect in which it was presented by the plaintiffs' proof, to have allowed Taylor to testify that the plaintiffs' bailees, of whom he was one, were incorrectly described as "Jemison, Ficklin & Co.," and had no such common name as that, would have been to permit him to discharge himself by his own evidence from a pending suit.

2. It was shown that B. F. Ficklin was a member of the firm, (whatever was its true style,) which hired the horse; and any act or declaration of his, in the course of the partnership business, which tended to show a recog-

nition of "Jemison, Ficklin & Co." as the firm name, was relevant testimony for the plaintiff. Upon this principle, we think the facts detailed by the witness Spencer were admissible, however slight the effect to which they were entitled.—Collyer on Part. §§ 422-3; Sanders v. Stokes, 30 Ala. 432.

The judgment of the circuit court is affirmed.

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## WOMACK vs. BOOKMAN.

[ACTION ON PROMISSORY NOTE.]

1. *Practice in peremptory call of docket.*—A civil cause, having been properly placed on the trial docket, may be peremptorily called at any time on or after the day for which its trial is set, and the defendant be required to state whether or not he has a defense to the action, although other preceding causes on the docket have not been called or disposed of.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Jacob Bookman against John F. Womack, and was founded on the defendant's two promissory notes. The summons was issued on the 5th October, 1857, and service was acknowledged on the next day. At the fall term, 1857, as appears from the bill of exceptions, "and on the last day of said term, on motion of the plaintiff, the cause was called by the court, before it had been regularly reached on the call of the docket; and the court then and there required the defendant to state whether or not he had any defense to the action. This the defendant declined to do before the cause was regularly reached; and thereupon the court called the cause for trial, without having disposed of the preceding cases on the docket, and ruled the defendant to trial; and the cause was submitted to a jury, who returned a verdict for the plaintiff. To these rulings of



the court, calling said cause before it had been regularly reached on the docket, requiring the defendant to state whether or not he had a defense to the action, and peremptorily calling the cause for trial as above stated, the defendant excepted;" and he now assigns them as error.

GEO. W. GAYLE, for the appellant.

RICE, C. J.—We understand it to be conceded, that this case was properly placed on the trial docket of the fall term, 1857, of the circuit court of Dallas. Upon that concession, the case stood for trial at that term, unless good cause for a continuance was shown, provided it was reached.—Code, § 2257.

True, no judgment could properly have been rendered at that term against the defendant, except by consent of himself or his attorney, within the first three days of the term; nor could the case have been regularly tried, without such consent, before the day for which it was set. Code, §§ 2258, 2261. But, after the expiration of the first three days of the term, and after the day for which this case was set had arrived or passed, and before this case was "passed over" or continued, the fact that the circuit court passed over other cases standing before this on the docket, and called this case peremptorily for trial, cannot entitle the defendant to a reversal of the judgment. We are not aware of any *legal right* of the defendant that is violated by such a course; and when no right conferred on *him* by law has been violated by the exercise of the discretion of the circuit court, in determining the order in which its business is to be disposed of, *he* cannot successfully assail the exercise of such discretion.

*Per Curiam.* (Feb. 23d.) The present court approves and adopts the foregoing opinion of the late chief-justice, and affirms the judgment of the court below.

## ENGLISH'S EX'R vs. MCNAIR'S ADMR'S.

[DETINUE FOR SLAVES AND OTHER PERSONAL PROPERTY.]

1. *Presumption in favor of affirmative charge.*—The appellate court will presume, unless the contrary is shown by the record, that a charge given by the primary court, on the effect of the evidence, (Code, §§ 2274, 2355,) was given on the written request of one of the parties.
2. *Validity of grant of administration to feme covert.*—Under the statutes of this State, (Code, §§ 1660, 1673, 1683,) as at common law, administration may be granted to a married woman, if her husband consent to her appointment; and when the validity of her administration is collaterally assailed, her husband's consent will be presumed.
3. *Construction of special contract of bailment.*—An administratrix, who was the sole distributee of her intestate's estate, delivered certain slaves and other property belonging to the estate to her married daughter, and took from her and her husband a receipt containing the following provisions: "Said property to be used and employed by us" [the daughter and her husband] "for our sole use and benefit, but nevertheless to be subject to her order, and to be returned whenever she may make demand of us, until the day of final settlement of said estate. Without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. G.," [the administratrix,] "as sole heir to said estate, shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper; and in case of her death before the final settlement aforesaid, then her co-administrator, A. W. S., is expressly admitted to all her rights under this instrument, for the purpose of making a final settlement of said estate; *provided, always,* that no clause in this instrument shall be so construed as to make us liable for the non-appearance of said property, if it is detained by death or accident." *Held,* that the contract evidenced by this receipt did not pass the title to the property from the administratrix, but constituted a mere bailment to her daughter and son-in-law, which was determinable on her demand at any time before the final settlement of the estate; with a further stipulation on her part, that if recourse to the property should not be necessary for the payment of debts, she would, when her right to the estate as sole heir accrued, substitute for that instrument such other conveyance as she might deem proper.
4. *Estoppel against administrator by illegal bailment.*—If an administrator makes an illegal bailment of property belonging to his intestate's estate, he is estopped from setting up a title in avoidance of it; but this principle does not prohibit him from recovering the property by suit after the termination of the bailment according to its terms.
5. *Damages.*—In detinue against an executor or administrator, damages may be recovered for his own illegal detention in his representative capacity, and for the previous illegal detention of his testator or intestate.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Ashley W. Spaight, as administrator, Mrs. Matilda M. George, as administratrix, and James George, the husband of said Matilda, as joint administrator in right of his wife, of Mrs. Letitia A. McNair, deceased, against the executor of Robt. J. English, deceased, to recover certain slaves and other personal property, together with damages for their detention. The only plea was the general issue, "with leave to give in evidence any matter which could be pleaded in bar;" and like leave to the plaintiffs to "give in evidence any matter which could be specially replied."

The material facts of the case, as stated in the bill of exceptions, are as follows: The slaves and other property sued for belonged to Mrs. McNair, plaintiffs' intestate, who died in Dallas county, Alabama, in August, 1853, leaving Mrs. Matilda M. George her sole distributee and heir-at-law. On the 5th September, 1853, letters of administration on the estate of said decedent were granted by the probate court of said county to A. W. Spaight and Mrs. Matilda M. George, the latter being at that time the wife of James George. These letters, as set out in the transcript, are in the usual form, and recite the fact that the decedent died in said county, leaving property therein; but they nowhere show that Mrs. George was then married. The property sued for "went into the possession of said plaintiffs, as such administrators, and remained in their possession until January, 1855," when Mrs. George, with the assent of Spaight, her co-administrator, delivered said property to Robert J. English (the defendant's testator) and his wife, and took from them a written instrument, or receipt, of which the following is a literal copy:

"Rec'd of Mrs. M. M. George as administratrix of the estate of L. A. McNair, deceased, the following, viz.: Patty, George, Sam, Nathan, David, Jane, Curtis, Maria, Albert and Lilly, and one mule, Nelly; *said property to*



*be used and employed by us for our sole use and benefit, but nevertheless to be held subject to her order, and to be returned whenever she may make demand of us until the day of final settlement of said estate without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. George as sole heir to said estate shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper. In case of her death before the final settlement aforesaid, then her co-administrator, A. W. Spaight, is expressly admitted to all her rights under this instrument for the purpose of making a final settlement of said estate. Provided always, that no clause in this instrument shall be so construed as to make us liable for the non-appearance of said property, if such property is detained by death or accident.*

GEORGIA ENGLISH,  
R. J. ENGLISH."

Under the construction of this instrument adopted by the court, the italicized portion of it should read thus: "*Said property to be used and employed by us for our sole use and benefit, but nevertheless to be held subject to her order, and to be returned whenever she may make demand of us, until the day of final settlement of said estate. Without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. George, as sole heir to said estate, shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper.*"

Mrs. English died in the latter part of the year 1855, and her husband in the year 1857. In February, 1856, Mrs. George demanded the property of said English, but he refused to deliver it up, and held possession of it until his death; and after his death his executor, the defendant in this suit, continued in the possession up to the commencement of the suit. No final settlement of Mrs. McNair's estate was ever made by her said administrators. The value of the slaves, and of their hire during the detention, was proved. The suit was commenced after the lapse of six months from the defendant's appointment

as executor, and the claim was proved to have been duly presented to him.

"The court charged the jury, 'that if they believed the evidence, they must find a verdict for the plaintiffs;' to which charge the defendant excepted, and then requested the following written charges:

"'1. That if the jury believe the evidence, the plaintiffs are not entitled to recover in this action.'

"'2. That under the evidence the jury must find a verdict for the defendant.'

"'3. That if the plaintiffs are entitled to recover in this action, they can only recover the hire of the negroes from the demand proved to the death of the defendant's testator.'

"'4. That if the property sued for were delivered to the defendant's testator before the receipt executed by him and his wife was delivered to Mrs. George, then said receipt does not entitle the plaintiffs to recover in this action, although they may have had possession of, and title to the property, previous to the execution of said receipt.'

"'5. That if the jury find that said property went into the possession of the defendant's testator and his wife, and was to be held by them under said receipt executed by them, and was so held by them, then the plaintiffs are not entitled to recover in this action.'

"'6. That if A. W. Spaight and James George consented to the delivery of said property to the defendant's testator and his wife, upon their execution of the receipt read in evidence, to be held by them under the terms of said receipt, then the plaintiffs are not entitled to recover.'

"'7. That if the jury believe from the evidence that the defendant's testator held said property under said receipt, and that he so held it by the consent of the plaintiffs, then the plaintiffs are not entitled to recover in this action, if the jury further believe that no final settlement of the estate of Mrs. McNair has ever been made; and that it is not necessary to return said property to pay the debts of said estate.'"

These charges were severally refused by the court, and

to the refusal of each the defendant excepted; and he now assigns as error all the rulings of the court to which he reserved exceptions.

WM. M. BYRD, GEO. W. GAYLE, and JOHN T. MORGAN, for the appellant, made the following points:

1. The affirmative charge of the court, in favor of the plaintiff's right to recover, was erroneous, because the statute (Code, § 2355) does not authorize the court to give such a charge *ex mero motu*, but only on the written request of one of the parties; and for the further reason, that such a charge should never be given where there is the least conflict in the evidence.

2. The plaintiffs were not entitled to recover on the evidence, because the grant of administration to Spaight and Mrs. George was good only as to the former, and conferred no authority on the latter or her husband to administer on the estate. A married woman cannot, without the consent of her husband, take a grant of letters testamentary, or of administration.—Code, § 1673; 2 Bright on H. and W. 38, 40, 42; 1 *ib.* 40; 1 Salkeld, 282; 3 Curt. 50; Godolph. Pl. 2, C. 10, § 1; Walker v. Fenner, 28 Ala. 367. As to the construction of the word *may*, as used in section 1673 of the Code, see Gould v. Hays, 19 Ala. 462; *Ex parte* Simonton, 9 Porter, 395; *Ex parte* Banks, 28 Ala. 28.

3. If the plaintiffs had any right to the property as administrators, their disposition of it to English and wife, as shown by the evidence, was a violation of their trust, and precludes them from recovering the property.—Lawson v. Lay, 24 Ala. 184; Pistole v. Street, 5 Porter, 14; Fambro v. Gantt, 12 Ala. Rep. 298; Kavanaugh v. Thompson, 16 Ala. 818; Swink v. Snodgrass, 17 Ala. 653; Hopper v. Steele, 18 Ala. 184. Under the provisions of the Code, an administrator has no right to sell privately. Ikelheimer v. Chapman's Adm'rs, 32 Ala. 676.

4. If the plaintiffs had a right to make the disposition of the property shown by the evidence, such disposition, with the consent of the sole distributee of the estate, was an administration of the property; and under the con-



tract signed by English and wife, Mrs. George alone, or she and her husband, individually, could maintain an action for its recovery.—Pickens v. Oliver, 29 Ala. 528.

5. In detinue against an executor, in his official capacity, for property which was detained by his testator, damages cannot be recovered for the hire subsequent to the testator's death. The executor cannot, by detaining the property, charge the estate. To allow him to do so, would violate well-settled principles.

D. W. BAINE, and J. R. JOHN, *contra*.—1. The delivery of the property to the defendant's testator, as evidenced by the instrument called a receipt, was a mere loan at will. The receipt itself, not being executed by Mrs. George, cannot operate a transfer by her, nor does it purport to be a conveyance or transfer by her. If the defendant took anything by the delivery, he took it by a parol gift. But it is an essential element of every parol gift, that the absolute title must vest in the donee at the time of the delivery, and that the donor must part with all dominion and control over the property: such a gift cannot be made to take effect upon the happening of a contingency *in futuro*.—Stallings v. Finch, 25 Ala. 522; Miller v. Anderson, 4 Rich. Eq. 6; Allen v. Polerschy, 31 Maine, 338; Walden v. Dixon, 5 Monroe, 170. The receipt contains three distinct clauses, clearly indicating that Mrs. George retained the dominion and control of the property: 1st, the clause providing that the property "shall be held subject to her order;" 2d, the clause providing that it "shall be returned whenever she may make demand," "until the day of final settlement of said estate;" and, 3d, the clause providing that she will make such future conveyance as she may deem proper. If Mrs. George's right to regain the property depends, as is contended by the appellant's counsel, upon the contingency of a necessity for the property to pay debts, such a construction of the instrument would not aid the appellant.—Stallings v. Finch, 25 Ala. 522. But such a construction is not authorized by the terms of the instrument. Mrs. George's right to demand the possession is unquali-

fied, at least until the final settlement of the estate. The clause in reference to the existence of debts, requiring the property for their discharge, is not a part of the stipulation respecting Mrs. George's right of demand, but refers only to the stipulation respecting the execution of another conveyance by her. The general intention of the parties clearly appears from the entire instrument. Mrs. George holds a large property, as one of the administrators of an estate of which she is sole heir. She knows that, until the property is distributed to her, she has no right to give it to any one; but she intends, after her title as distributee accrues, to give it to her children. In the meantime, she and her co-administrators are willing to let her children have the use of the property; leaving the title in the estate, and reserving to the administrators the control over the property, with the right to retake the possession at any time before her title as sole heir accrues. This construction harmonizes every sentence in the instrument, and no other construction does.

2. This contract was not such an illegal act as will prevent a recovery of the property by the plaintiffs after the termination of the bailment. The Code of Alabama contains no express prohibition of loans or private sales by administrators, though his common-law right is taken away by necessary implication, and he has now no authority to loan or sell the property privately. But a mere want of authority, in one of the parties to a contract, is no defense to an action by him, if the other party has obtained all that he contracted for.—Terry v. Berghaus, 8 Porter, 500; Lampkin v. Reese, 7 Ala. 170; Tompkins v. Reynolds, 17 Ala. 117; Story on Bailments, § 159. To prevent the maintenance of an action on a contract, on account of its illegality, there must be some act *malum in se*, or in violation of some positive law. If this position be correct, the cases of Fambro v. Gantt, and Lay v. Lawson, which were governed by the act of 1809, are not applicable to this case. The maxim invoked by the appellant, *in pari delicto potior est conditio possidentis*, only applies where a party seeks to recover on an illegal contract, or seeks to avoid it by setting up its illegality.

Chitty on Contracts, 657; Snodgrass v. Cabiness, 15 Ala. 162. In this case, the plaintiffs do not seek to recover on the contract, and are not precluded by its terms. They sue on their title as administrators, a title which is outside of the contract under which the defendant obtained possession. At the termination of the bailment by its terms, whatever illegality affected it during its continuance would cease. If an administrator unlawfully hires out a slave for a year, he certainly does not thereby forfeit the title to the property.

3. It is the settled law of Alabama, that the distributees of an estate may ratify and confirm an illegal sale by the administrator, and the same, when confirmed, is valid against the whole world.—Elliott v. Br. Bank at Mobile, 20 Ala. 346; Kavanaugh v. Thompson, 16 Ala. 817. Mrs. George was the sole heir and distributee of the estate, and must be presumed to have assented, as distributee, to her own act as administrator.

4. The defendant, having admitted by his contract the representative character of Mrs. George, is now estopped from denying it.—Harbin v. Levi, 6 Ala. 401; Browning v. Huff, 2 Bailey, 178.

5. The grant of administration to Mrs. George was not void on account of her coverture.—1 Wms. Ex'rs, 267, and note *l*. Although the law requires the husband's assent, this is a matter for the determination of the probate court alone, and its existence must be presumed.—Sims v. Boynton, 32 Ala. 353; Miller v. Jones, 26 Ala. 247; McGrew v. McGrew, 1 Stew. & P. 30; 4 Phil. Ev. 65; 1 Greenl. Ev. § 550. The provision of the Code, that administration *may* be granted to the husband when the wife is entitled to it, merely gives the court power to prefer him, but does not take away the common-law capacity of the wife.

6. The charge of the court, as to the executor's liability to damages, was correct.—Allen v. Harlan, 6 Leigh, 45; Catlett v. Russell, 6 Leigh, 361; Mansell v. Israel, 3 Bibb, 511; Brewer v. Strong, 10 Ala. 963.

7. The affirmative charge of the court, in favor of the plaintiffs' right to recover, must be presumed to have



been given on their written request, since the contrary is not affirmatively shown by the record.

A. J. WALKER, C. J.—Section 2274 of the Code prohibits the giving of a charge to the jury upon the effect of the testimony, unless the court is required to give such a charge by one of the parties. Section 2355 of the Code says, that “charges, moved for by either party, must be in writing.” An affirmative charge, upon the effect of the entire evidence, in favor of the plaintiff, was given by the court below. It does not appear from the bill of exceptions whether that charge was or was not given upon the request of the plaintiff, nor, if given upon request, whether it was orally asked, or “*moved for*” in writing. The record being silent upon the subject, we must presume that the charge was given upon request in writing, or we must presume that it was given by the court *mero motu*, or, if requested, that it was not moved for in writing. The first of the above stated presumptions must be here adopted, because it is an established principle with appellate courts to presume the correctness of the proceedings of the court below, and not to impute error unless it is affirmatively shown by the record.

[2.] It is contended, that the administration of one of the plaintiffs, Mrs. George, is void, because she was a married woman at the time of her appointment. Coverture was not, at common law, a disqualification for the office of administratrix; if the husband consented to the appointment; and it seems that the husband's consent to the administration, when collaterally assailed, was presumed.—1 Wms. on Ex'rs, 369; *ib.* 190–191; 1 Lomax on Ex'rs, 167, marg. 68. It is not disclosed in this case in any way, whether Mrs. George's husband consented to her administration. Guided by the common law, and indulging its presumption, we should therefore determine in favor of the validity of the administration. But the influence of our statutory law upon the question is to be weighed, before we can attain a conclusion.

Section 1660 of the Code is in the following words: “No married woman is *entitled* to letters *testamentary*,

unless her husband consent thereto by a writing signed by him, and filed with the judge of probate; and by giving such consent, he becomes responsible for her acts, jointly with her." The words of this statute do not import the absolute disqualification and incapacity of a married woman to take the trust of an administration, except with the written and duly-filed consent of her husband. It says she is not "entitled." She has no claim, no right to be appointed. She is legally unfit for the office, unless the prescribed consent should be given and filed. Without such consent, her appointment was erroneous, and her administration would be revocable; yet it is not absolutely void. Her administration, like that of an infant or alien, might be at any time revoked by an appropriate proceeding; but, in the absence of such revocation, it is not to be deemed a nullity.—1 Wms. on Ex'rs, 489-490; 1 Lomax on Ex'rs, 356, marg. 195; Palmer v. Oakley, 2 Douglas, (Mich.) 433; Ray v. Doughty, 4 Blackf. 115; Savage v. Benham, 17 Ala. 126.

Our statute has but asserted a well-recognized principle of the common law, in requiring the husband's consent to his wife's administration. It has only modified the common law, by requiring the consent to be given in writing, and filed in the court, and in making his responsibility a consequence of the written consent. The question of the validity of the wife's administration, when collaterally assailed, remains now, so far as we can perceive, as it was at common law. While the books leave the question of the manner in which the husband may treat his wife's administration, commenced during the coverture, in some obscurity and doubt, they are clear in maintaining the validity of her administration, when attacked by third persons, otherwise than by a direct proceeding for its vacation or revocation.—Wms. on Ex'rs, 190-191; Went. on Ex'rs, 377; 1 Lomax on Ex'rs, 147; Palmer v. Oakley, *supra*.

The statute, in its *letter*, includes only letters testamentary. The bill of exceptions leaves some room for doubt, whether the deceased did not leave a will, and whether the authority of the plaintiffs was not conferred by letters

testamentary. But it is not necessary for us to inquire, whether the spirit and intent of the statute does not bring letters of administration within its operation, or whether the plaintiffs' are letters testamentary, and therefore within the letter of the statute. For it results from what we have said, that the statute quoted would not make the authority of the feme plaintiff void, even though its applicability be conceded.

Section 1673 of the Code declares, that "when a married woman is entitled to the administration, it may be granted to her husband in her right." Whatever may be the effect of that section, in making the appointment of a married woman erroneous, or in giving the husband a right to stand in her place and claim the administration, it cannot be construed into the declaration of her absolute incompetency and incapacity to take the trust, or that her appointment when made is utterly void. It operates upon the right to the trust, and not upon the validity of the appointment.

The only other statute touching the question under consideration is section 1683 of the Code, which prescribes that "every person, appointed executor, administrator, or special administrator, except," &c., "must give bond, with at least two sufficient securities." The argument drawn from this section is, that a feme covert, being incompetent to contract, cannot execute the requisite bond, and consequently must be incompetent to take the office of administratrix. A reply to that argument, at least plausible and supported by respectable authority, is, that the giving of a bond is not a condition precedent to the appointment; that the administration in fact commences before the giving of the bond; that there might be a revocable, though valid administration, without a bond; and that therefore the question of the validity of the administration could not hinge upon the capacity to execute a bond.—*Palmer v. Oakley, supra*; *Russell v. Coffin*, 8 Pick. 143. We, however, neither affirm nor deny the correctness of the reasoning suggested, because we prefer to place our conclusion upon a different point.

The requisition that the administrator shall give bond



with sureties does not imply that he must necessarily and in all contingencies *execute* the bond. An administrator may literally comply with the law, by *giving* a bond with the necessary sureties, without executing it himself. A construction which required an administrator or executor to execute or sign the bond in every case, would render section 1660 nugatory, so far as it allows a married woman to be the representative of an estate, when her husband shall give his written consent and the same is properly filed.

The analogy of the decisions of this court, in reference to a kindred question, affords strong support to the conclusion, that there is no unbending rule requiring in all cases the execution of the bond by the administrator. Thus it has been decided, that a statute requiring a claimant in a trial of the right of property, or his attorney, to give bond with security, did not make it indispensable in every case that the bond should be executed by the claimant or his attorney.—*Marrs v. Garrett, Minor*, 406; *Graham v. Lockhart*, 8 Ala. 9; *Strode v. Clark*, 12 Ala. 621.

A similar question, upon a statute requiring the giving of a bond with security by a guardian, arose in Michigan; and it was held, that the execution of the bond by the guardian in every case was not indispensable, and that a married woman could qualify as guardian by giving a bond executed by others, and not by herself.—*Palmer v. Oakley, supra*. The same conclusion has been attained in England, in reference to similar statutes.—1 *Bacon's Abr.* 552, *Bail in Civil Cases*, B, 7; 2 *Tidd's Prac.* 1252; 8 *East*, 298.

Upon the reasoning and authorities presented above, we decide, that there is nothing in the statute which prohibits a married woman's qualification as administratrix by giving a bond executed by others, and consequently her incapacity to contract does not render her appointment void.

[3.] There is some obscurity in the instrument of writing given by English and wife to Mrs. George. The obscurity is increased by the want of punctuation, the

omission of capitals, and the probable want of words intended to be inserted. After a careful examination of it, and endeavoring to so punctuate and construe it as to allow effect to all the words, and to secure consistency among them, we understand it as constituting a bailment by the latter, as administratrix, to the former, and determinable upon the demand of Mrs. George at any time before the final settlement of the estate. We understand it also to contain an agreement, that if recourse to the property for the payment of claims against the estate should not be necessary, Mrs. George would, when her right as sole heir to the estate accrued to her, substitute for that instrument such other conveyance as she might deem proper. It also contains a clause giving to Mrs. George's co-administrator, A. W. Spaight, in the event of her death before a final settlement, all the rights of Mrs. George under the instrument for the purpose of making a final settlement, provided that English and wife should not be liable for the non-appearance of the property, if detained by death or accident. The correctness of our construction will be apparent to any one, who will look at the instrument and regard a period as inserted after the words "until the day of final settlement of said estate," and the succeeding words, "without recourse," &c. as commencing a new sentence, and the initial "w" as a capital.

[4.] This instrument did not vest English and wife with a title to the property, but constituted them bailees, and made the bailment determinable by a demand, which was made before the commencement of this suit. If this bailment was illegal, under the decisions of this court, the administrator would be estopped from setting up a title in avoidance of it.—*Pistole v. Street*, 5 Porter, 64; *Swink v. Snodgrass*, 17 Ala. 653; *Kavanaugh v. Thompson*, 16 Ala. 817; *Lawson v. Lay*, 24 Ala. 184; *Fambro v. Gantt*, 12 Ala. 298; *Farrow v. Bragg*, 30 Ala. 261; *Easley v. Boyd*, 12 Ala. 684. But this principle cannot be understood as estopping an administrator from recovering property, after the expiration of the bailment, in perfect accordance with its terms. It may be that a

recovery here could not be had during the bailment, or in contravention of it. But there is no principle of law or right, which prohibits an administrator, who has made an illegal bailment of property, from regaining the possession of the property after the termination of the bailment.

[5.] Where an executor or administrator unlawfully detains, in his representative capacity, personal property, which had been previously detained in a similar manner by the testator or intestate, damages for the detention by the representative, as well as by the deceased, may be recovered in an action against such representative. We content ourselves by referring to *Brewer v. Strong*, 10 Ala. 961, and the cases therein cited, which, we think, fully sustain the position.

The judgment of the court below is affirmed.

## BENNETT vs. BENNETT.

[ACTION BY WIFE AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Conclusiveness of settled rule of property.*—A decision of the supreme court, which has probably become a rule of property, should be adhered to by the courts, even where its correctness might be doubted if the question were *res integra*.
2. *Husband's rights to emblements of wife's separate estate.*—On the death of the husband before the maturity of the crop planted by him on the wife's lands, and cultivated with the slaves belonging to her separate statutory estate, his administrator is entitled, as against the surviving wife, to the proceeds of such crop. overrule  
41 A.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mrs. Margaret C. Bennett, against Burgess Bennett, who was the administrator of the plaintiff's deceased husband, Jerome Bennett. The complaint contained all the common money counts, and



sought to charge the defendant individually. The only plea was the general issue, "with leave to give in evidence any matter that could be specially pleaded in bar, and with like leave to the plaintiff to give in evidence any matter that could be specially replied." The facts of the case, as adduced in evidence on the trial, are thus stated in the bill of exceptions:

"The plaintiff was married to Jerome Bennett, in Alabama, on the 8th July, 1851. At the time of her marriage, and at the time of her said husband's death, which occurred on the 26th June, 1855, she had a separate estate in lands, slaves, farming stock and implements, which she held as such under the statutes of this State. In the spring of 1855, her said husband planted a crop of corn and cotton on her said lands, and, at the time of his death, was cultivating it with her slaves, stock and farming implements; he having on said plantation no property of his own other than said separate property of his wife. In October, 1855, the defendant was duly appointed and qualified as administrator of said Jerome Bennett, and, as such administrator, afterwards took control of the property aforesaid, had the crop cultivated until it ripened, gathered it, took the cotton to market, and sold it by order of the probate court of Wilcox, from which he received his appointment. The net proceeds of the sale of said cotton, after deducting \$300 overseer's wages for the year 1855, which were paid by the defendant, amounted to \$1597 26, which was received by the defendant before the commencement of this suit, including interest. The defendant then proved, that he had paid, before the commencement of this suit, an account of A. T. Smith for medical services rendered by him to the said slaves between February and December, 1855; also, an account of \$247 86, to G. W. Sherman, for corn purchased by Jerome Bennett in January, 1855, and consumed on said plantation by the negroes and stock in making said crop; also, an account of \$126 50 to Clark & Longhorne, physicians, for medicines and medical services furnished and rendered by them, at intervals, between January and November, 1855, for the negroes on said plantation; also,

two accounts for blacksmith work done during the year 1855 in repairing the wagons and plows, shoeing the horses, &c., on said plantation, which together amounted to over \$200; also, an account of \$257 to Hudson & Wyatt, merchants, for goods sold by them to plaintiff between the 5th July and 28th December, 1855; all which accounts were proved to be reasonable, and the expenditures to be necessary. Jerome Bennett left one child, still living, the offspring of his marriage with plaintiff; and the defendant's administration on his estate has not been settled.

"This being all the evidence in the case, the court charged the jury, that if they believed the evidence, they must find for the plaintiff the amount of money which *he* (?) had received as the net proceeds of the cotton crop grown on the plaintiff's lands in 1855, without deducting therefrom, or allowing in favor of the defendant, any of the sums which he had paid out, as set forth in the evidence, except the overseer's wages paid by him;" to which charge the defendant excepted, and which, with other rulings of the court which require no particular notice, he now assigns as error.

BYRD & MORGAN, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—In *Weems v. Bryan and Wife*, 21 Ala. 302, 308, this court, speaking of the rights of the husband in the separate estate of the wife which she holds under the statutes of this State, said: "There can be no doubt but that the husband becomes tenant for the life of the wife, (*per autre vie*,) of the rents and profits of the wife's estate. The right 'to have and possess, control and manage' her property during the coverture, without liability to account for rents and profits, makes him so. Like every other tenant for life, he is entitled to emblements, that is, the crop growing or matured, and whether gathered or not gathered, at the termination of the life estate."—See 2 Black. Com. 403-4.

Under the rule laid down in *Price v. Pickett*, 21 Ala.

741, the crop of 1855 was emblements, if the estate of Jerome Bennett was such as to entitle him to it.

The case of Weems v. Bryan and Wife, *supra*, was decided more than six years ago. It lays down a rule for the descent and disposition of property, which, it is reasonable to suppose, has been frequently acted upon. It has thus, doubtless, become a rule of property; and while we forbear to express any opinion as to the correctness of that decision, if the question were *res integra*, we are unwilling to unsettle titles which probably rest on its principles. We are the more reconciled to this conclusion, because in the settlement of the accounts between the wife and the estate of the husband, where each owned property, and they had worked their property in common, the most embarrassing difficulties would frequently be encountered in separating the one interest from the other.

It results from what we have said, that the circuit court erred in its charge to the jury.

Reversed and remanded.

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### FULLER vs. HUNTER.

#### [MOTION FOR TAXATION OF COSTS.]

1. *Costs on successful plea of set-off.*—Where a set-off is pleaded and controverted, and the witness by whom it is established is sought to be impeached, the defendant is entitled to recover (Code, § 2378) the costs of all the witnesses, without regard to their number, who were summoned for the purpose of impeaching or sustaining said witness, and examined on the trial.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. PORTER KING.

THIS action was brought by John Hunter against Bartholomew Fuller, and was founded on the defendant's promissory note for \$516. The only defense interposed



by the defendant was the plea of set-off, and on the issue joined on that plea the plaintiff recovered a verdict and judgment for twenty-seven cents. The set-off was proved on the trial by the testimony of one T. E. Fuller, a witness summoned for that purpose by the defendant. Seven witnesses were summoned by the plaintiff to impeach said Fuller, and eleven by the defendant to sustain him; and all these witnesses were examined on the trial. After the trial, the defendant moved the court to tax the plaintiff with the costs of all these witnesses, which, including the fees of the clerk for issuing the subpoenas, of the sheriff for executing them, and of the attendance of the witnesses, amounted to \$132 25. The court taxed the plaintiff with the costs of the witness Fuller, but refused to tax him with the other costs; to which latter ruling the defendant excepted, and which he now assigns as error.

S. F. HALE, for the appellant.

R. F. INGE, *contra*.

R. W. WALKER, J.—By section 2378 of the Code it is provided, that, “in all actions where a set-off is pleaded and controverted, the defendant recovers his costs sustained in establishing the set-off, though judgment be rendered for the plaintiff for a residue.”

When a defendant proves his set-off by a witness whose reputation for veracity is attacked, and witnesses are summoned by the plaintiff to discredit, and others are summoned by the defendant to sustain the impeached witness, the costs of all these witnesses, without regard to their number, (Code, § 2392,) are to be considered as having been incurred in establishing the set-off; and the defendant is entitled to a judgment for such costs against the plaintiff. The fees of the clerk for issuing, and of the sheriff for executing the subpoenas for these witnesses, constitute, as a matter of course, a part of the costs which the defendant is entitled to recover.

The action of the court below was in conflict with this view; and the judgment on the motion to re-tax the costs must be reversed, and the cause remanded.

## WRAY vs. TUSKEGEE INSURANCE CO.

[ACTION ON BILL OF EXCHANGE BY ENDORSEE AGAINST MAKER.]

1. *Bailment of bank-bills.*—A simple loan or deposit of bank-bills by a banking corporation creates the relation of creditor and debtor between the bailor and bailee, and binds the latter to repay the amount, without interest, on the demand or check of the former, but not to keep and return the specific bills received.
2. *Validity of contract for purchase and discount of bill of exchange by corporation.*  
In an action on a bill of exchange by a private domestic corporation, having power under its charter "to purchase, discount and sell bills of exchange," but prohibited from making or issuing any bills, bonds, notes or other securities to circulate in the community as money, a plea, averring that the plaintiff procured from a foreign bank a loan or deposit of a large amount of its notes, for the unlawful purpose of issuing and putting said notes in circulation in this State, "and under an express agreement with said bank to redeem said notes as the same should be returned to the counter of said bank by which they were issued;" that plaintiff, with the bank-notes thus obtained, "made discounts, purchased bills, and did other business pertaining to banking," and issued and put said notes in circulation as money; that the bill of exchange sued on was made for the benefit of defendant, "and with the intent to have the same discounted by plaintiff, either with said foreign bank-bills or some other bank-bills, as plaintiff might see fit and proper;" that it was presented at plaintiff's banking-house for discount, "and was then and there accepted and discounted by plaintiff with said foreign bank-bills;" that plaintiff, in thus using said foreign bank-notes in the purchase and discount of said bill, "did emit, issue and put them in circulation in this State;" and that this was the only consideration given by plaintiff for said bill of exchange,—does not show any illegality of consideration in the contract by which plaintiff obtained the bill of exchange; the averments not being sufficient to show the existence of an agency between plaintiff and the foreign bank, within the meaning of section 939 of the Code, nor a violation of the plaintiff's charter.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. S. D. HALE.

THIS action was brought by the Tuskegee Insurance Company, a corporation chartered by the legislature of this State, (Session Acts 1855-6, p. 257,) against Albert G. Wray, and was founded on the defendant's bill of exchange for \$1828 80, dated the 17th April, 1857,

addressed to one Joseph A. Jones, payable thirty days after date to the defendant's own order, and endorsed to plaintiff. The defendant interposed two pleas in bar of the action, which were as follows:

"1. Defendant says *actio non*, because he says that, on or about the 19th January, 1856, D. Clopton, Seaborn Williams, J. W. Echols, S. B. Paine, A. D. Porter and R. F. Ligon procured an act of the general assembly of the State of Alabama to be passed, incorporating the Tuskegee Insurance Company; that afterwards, to-wit, in 1856, the said plaintiff, unauthorized by law, and contrary to the statutes of the State, negotiated with, and procured a large loan or deposit, to-wit, the sum of \$50,000, to be made to them by the Farmers' and Exchange Bank of Charleston, an incorporated institution located in the city of Charleston, in the State of South Carolina, in the bills of said bank, for the unlawful purpose of banking, issuing and putting in circulation the said bills of said bank in the community of the location of said plaintiff, under the express agreement with said bank to redeem the said bills as the same should be returned to the counter of said bank by which they were so issued; that under and by virtue of said agreement, said plaintiff did draw from said Farmers' and Exchange Bank \$50,000, or other large sum, in the bills of said bank, upon which to do a banking business in the town of Tuskegee, Alabama, where said plaintiff is situated; that said plaintiff, in contravention of the statute laws of Alabama, did emit, issue and put in circulation, in the county of Macon, Alabama, the said bills of said Farmers' and Exchange Bank, with which said plaintiff did make discounts, purchase bills, and do other business pertaining to banking; that said plaintiff afterwards, and during the year 1856, and before the discounting of said bill of exchange in plaintiff's complaint mentioned, in pursuance of such unauthorized and illegal intent, did erect and establish a banking-house in the town of Tuskegee in said county, under the name of the Tuskegee Insurance Company, and did issue, emit and put in circulation, at their said banking-house, the said bills of said Farmers' and



Exchange Bank, to circulate as money, and with said bills made discounts of bills of exchange and promissory notes, and thereby caused said bank-bills to circulate as money in the community in which plaintiff's said banking-house is situated; that on the 17th April, 1857, the said bill of exchange in said complaint mentioned was made for the benefit of this defendant, and with the intent to have the same discounted by plaintiff, either with said bank-bills or some other bank-bills, as said plaintiff should see fit and proper, at plaintiff's said banking-house, so illegally established as aforesaid; that afterwards, to-wit, on the 17th April, 1857, defendant presented said bill of exchange at plaintiff's said banking-house for discount, and said plaintiff then and there accepted and discounted the same in the bills of said Farmers' and Exchange Bank of Charleston, which plaintiff had no proper authority to do. And defendant here avers, that the only consideration for the said bill of exchange, known to him, was in the bills of said Farmers' and Exchange Bank of Charleston, an incorporated institution in the State of South Carolina; that said plaintiff, under the name of the Tuskegee Insurance Company, did emit, issue and put in circulation, in said county of Macon, the said bills of the Farmers' and Exchange Bank of Charleston, when the plaintiff used the same in discounting said bill of exchange; and hence he says, that said bill of exchange was without any consideration, or for a consideration prohibited by law; by means whereof, and by force of the statute in such cases made and provided, said bill of exchange and endorsement thereof were, and are, void and of no effect in law. And this he is ready to verify," &c.

"2. *Actio non*, because he says that said bill of exchange, in said plaintiff's complaint mentioned, was discounted at said plaintiff's counter or office, in the bills of the Farmers' and Exchange Bank of Charleston, a corporation chartered by the general assembly of the State of South Carolina, or in the bills of other banks located and situated without the limits of the State of Alabama, in the regular course of banking, contrary to the statutes of the

State of Alabama; and that the bills, with which said bill of exchange was discounted, were the bills of the Farmers' and Exchange Bank of Charleston, or the bills of other banks situated out of the State of Alabama, and were procured by said plaintiff upon which to bank, and to issue and put in circulation as money in said plaintiff's vicinity in said county of Macon, contrary to the statutes in such case made and provided; wherefore the said defendant says, that said bill of exchange and endorsement thereof were given and made for a consideration prohibited by law, and are void and of no force. All which he is ready to verify," &c.

To each of these pleas the plaintiff demurred, assigning the following grounds of demurrer: "1st, that the facts set forth in each of said pleas are insufficient in law to bar or preclude plaintiff's said action; 2d, that neither of said pleas shows that plaintiff made or issued its bills to circulate as money; 3d, that neither of said pleas avers that plaintiff is or was the agent of a foreign banking corporation, doing a banking business in this State on foreign bank-bills; and, 4th, that the facts stated in said pleas show no violation of law." The court sustained the demurrers, and its ruling is now assigned as error.

GEO. W. GUNN, for the appellant.—1. The facts averred in each of the pleas, when tested by the rules of pleading, show that the plaintiff, though prohibited by its charter from issuing any bills or notes to circulate as money, was, in fact, a bank in disguise, doing a banking business under the name of an insurance company; that it procured bank-notes from a foreign banking corporation for the purpose of carrying on such a business, and used them in the purchase and discount of the bill of exchange sued on. These facts show that the plaintiff's purchase and discount of the bill was illegal—1st, because it was an express violation of its charter; and, 2d, because it was a violation of the statute which prohibits foreign banks from exercising banking privileges in this State, by agency or otherwise.—Code, §§ 939, 940, 1484; Session Acts 1855-6, p. 257; *Utica Insurance Co. v. Scott*,

19 John. 1; Mayor of Tuscaloosa v. Lacy, 3 Ala. 618; Craig v. Missouri, 4 Peters, 52; Darrington v. State Bank, 13 How. (U. S.) 12; Owen v. Branch Bank, 3 Ala. Rep. 258.

2. A contract which is prohibited by statute, though not declared absolutely void, is illegal, and cannot be enforced in any court.—17 Barbour, 397; 6 Barbour, 398; 3 Barbour, 222; 12 Barbour, 302; 3 Denio, 226; 4 Denio, 63; 14 Johns. 273; 20 Johns. 397; 4 Hill's (N. Y.) R. 424; 4 Comstock, 449; Smith on Contracts, 71; 1 Smith's Leading Cases, 353.

CLOPTON & LIGON, with WM. P. & T. G. CHILTON, *contra*. Construing the pleas most strongly against the pleader, and omitting all argumentative averments and legal conclusions, the material facts averred are—1st, that the plaintiff was incorporated; 2d, that it borrowed bank-notes from a bank in Charleston, and, as a term of the contract, agreed to redeem them when returned to the bank at Charleston; and, 3d, that the bill of exchange sued on was discounted by the plaintiff with these or some other foreign bank-notes. These facts, standing alone, or construed in connection with the plaintiff's charter, do not show a violation of any general statute, nor of any provision of said charter.—Duncan v. Maryland Savings Institution, 10 Gill & John. 507; Branch Bank v. Knox & Co., 1 Ala. 148; Bates v. Bank, 2 Ala. 451; Gee v. Life Insurance Co., 13 Ala. 579.

A. J. WALKER, C. J.—The material question presented by the demurrer to the first plea, is, whether the facts stated in that plea show that the bill of exchange sued upon was given for an illegal consideration. The power of the corporation to discount the bill is not disputable, because by its charter it has express authority "to purchase, discount, and sell bills of exchange." Acts of '55 and '56, page 259.

Section 939 of the Code prohibits a foreign corporation, invested with the privilege of banking, from exercising that privilege by agent in this State, except by the



exclusive use of gold and silver coin, and bank-bills issued by the authority of this State. The first plea does not present a transaction violating that statute. It does not aver that the plaintiff was the agent of the foreign corporation, nor does it allege such facts as, *per se*, authorize the legal inference of an agency.

The proviso to section 5 of the plaintiff's charter prohibits it from making or issuing any bills, bonds, notes or other securities, to circulate in the community as money. See, also, Code, §§ 3268, 3269, 1484. It is claimed in argument for the appellant, that an infringement of this proviso is shown by the plea, and that the infringement consisted in an issue of the bills of the Farmers' and Exchange Bank, as the consideration of the bill of exchange. The plea alleges, that the money with which the bill was discounted was loaned to the plaintiff, or deposited with it, by the Farmers' and Exchange Bank. If the bills of the South Carolina Bank were received by the plaintiff on deposit, the plea does not permit us to suppose that the deposit was special, creating the relation of bailor and bailee between the South Carolina Bank and the Tuskegee Insurance Company, and binding the latter to keep and return the specific bank-bills received. On the contrary, the averments of the plea demonstrate, that the bank-bills were received to be used by the plaintiff, and not to be kept for the Farmers' and Exchange Bank. For this reason, and because a general deposit among bankers is not deemed a bailment of specific articles of money to be returned, the plaintiff must be regarded as having received the money to be used by it, without any obligation to return the particular bank-bills.

The deposit with the plaintiff by the Farmers' and Exchange Bank, thus explained, constituted the former the debtor of the latter to the amount of the deposit; creating an obligation to pay upon the demand, or upon the check of the latter, without interest. Such a deposit is a gratuitous loan, and it makes the depositor a creditor, and the depository a debtor.—*Cromwell & Wing v. Lovett*, 1 Hall, (N. Y.) 62; *Chapman v. White*, 2 Selden, 416; *Com. Bank of Albany v. Hughes*, 17 Wendell, 100;

Barnet v. Smith, 10 Foster, 264; Story on Promissory Notes, 614, § 487.

As the deposit is to be regarded in the light above stated, it is not material to inquire which one of the alternative statements, that there was a deposit or a loan, should be adopted. Upon either alternative, the specific bank-bills received from the Farmers' and Exchange Bank became, *eo instanti*, the property of the plaintiff: they were at the plaintiff's risk; if lost, the plaintiff sustained the loss; and the plaintiff was indebted to the bank to the amount of the bank-bills received.

The fact that the bank-bills were received on loan, or on such a deposit as we understand the plea to allege, affords a *prima-facie* negation that they were issued by the plaintiff. The word "*issue*," when used in reference to bank-bills, is the antithesis of circulation. Chief-Justice Marshall, in his decision in the case of Craig v. Missouri, 4 Peters, 410, treats "*emit*," in that article of the constitution which prohibits a State "to emit bills of credit," as synonymous with "*issue*." Then, to "*issue*" bills to circulate as money is to "*emit*" them—to send them out. It is an act antecedent to the circulation of the bills, and different from it. If the Farmers' and Exchange Bank, by loan or deposit, transferred the property in its bills to the Tuskegee Insurance Company—deprived itself of the ownership of the bills, and made them the property of the plaintiff; and the plaintiff thereby became a debtor to the bank for the bills so received, the bills were issued by the bank itself when they were delivered. When they passed from the bank, and became the property of the plaintiff, they were issued, or emitted; and the subsequent use of them by the plaintiff was a circulation, not an issue of them.

We do not deny, that the deposit or loan might be a simulated transaction, used to disguise a real agency for the issue and putting in circulation at Tuskegee of the bills of the Farmers' and Exchange Bank. The bills could pass from the Tuskegee Insurance Company, acting for the bank at Tuskegee, and the issue of the bills by such an agent would be an issue by the bank itself. But

such is not the case made by the plea. That case is one where the bank parted with the property in the bills, and the insurance company, in using the bills, used its own property, not the property of the bank; and the bank, in parting with the bills, did not place them in the hands of an agent, but emitted them.

The plea does assert that the bank-bills were "issued" in Tuskegee. But this assertion is, *prima facie*, inconsistent with the other allegation, that they were loaned or deposited in Charleston by the bank. It may be that the two could be reconciled. They are, however, without reconciliation, inconsistent; and there is no averment of any matter which harmonizes them. We must, therefore, adopt that construction which allows force to the averments which militate against the sufficiency of the plea.

Upon the allegations of the plea, the bank-bills must be regarded as having been borrowed, or received on deposit, in Charleston. The plaintiff having by its charter power, in common with natural persons, to discount bills of exchange, its use of the bank-bills so received in the discount of paper would no more be an issue of those bills, than would the same act done by a natural person.

Whatever may be the tendency of the allegation that the plaintiff agreed to redeem the bank-bills received from the bank, that fact, standing alone, is not sufficient to authorize the legal inference that the use of such bank-bills by the plaintiff was an issue of them.

The second plea presents no feature necessary to be considered, after what we have already said, except that it does not, like the first plea, aver that the foreign bank-bills were borrowed. It says that they were procured "to issue and put in circulation as money in the vicinity" of the plaintiff. But the plea does not show that the issuance and putting in circulation of the bills occurred in the discount of the paper sued upon. It does not show any illegality in the particular transaction. It may be, consistently with everything disclosed in the plea, that it was after the foreign bank-bills were put in circulation, and returned to the insurance company, that the paper in suit was discounted.



In order to meet the questions argued by counsel, we have considered this case on the concession to the appellant that the appellee's charter was before the court; but, in so doing, we do not desire to be understood as deciding that it was proper for the court below to have looked to the charter for any purpose.

The judgment of the court below is affirmed.

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### COLLINS & LANGWORTHY *vs.* OWENS.

[BILL IN EQUITY FOR SETTLEMENT OF PARTNERSHIP ACCOUNTS.]

1. *Mode of stating partnership accounts.*—In stating the accounts of an equal partnership between three partners, under a bill filed by two against the third, the latter being the sole active manager of the business, the profit and loss account should be first adjusted, by ascertaining the gross income and expenses of the partnership, and striking a balance between the two sums; and a separate account with each partner should then be stated, for the purpose of apportioning the profits, or equalizing the losses: a simple debtor and creditor account, between the complainants on one side and the defendant on the other, is incorrect and erroneous.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the appellants, Robt. C. Collins and William Langworthy, against Richard B. Owens, and sought a settlement of the accounts between the parties as equal partners in a livery stable in Montgomery. After the coming in of the answer, the chancellor ordered a reference of the matters of account to the master. The account was stated by the master in debtor and creditor form, between the complainants on one side, and the defendant on the other, and showed a balance of \$596 in the defendant's favor. The complainants reserved sundry exceptions to the account as stated by the master, all of which were over-

ruled by the chancellor, who, on final hearing, dismissed the bill. The errors now assigned are, the overruling of the complainants' exceptions to the master's report, and the dismissal of their bill.

THOS. WILLIAMS, for appellants.

ELMORE & YANCEY, *contra*.

STONE, J.—The two complainants and the defendant entered into an equal partnership in the livery-stable business, commencing about the first day of June, 1845, and continuing about two years. Their contract was not reduced to writing; but the pleadings and proofs show, that Owen was to superintend the business, and to receive from the firm a certain compensation for his services. The testimony of the witness Staples shows what the stipulated compensation was—viz., \$300 per annum, and the board of himself and family. We do not, however, determine this question absolutely, but leave it for ascertainment in taking the account.

The property—stable and lot—was purchased from Mr. McGehee for \$2000, and an unexpired lease to Staples was bought in for \$250—added together, making \$2250. One third of this is \$750. Collins and Langworthy paid \$2150, and Owens \$100. Owens was to pay one-third of the purchase-money, and then to receive a deed for one-third of the property. On the 4th June, 1845, Collins and Langworthy gave Owens a receipt for \$350, stating therein that the balance due from him was \$400. If the \$100 paid by Owens to Staples was included in the receipt for \$350, then \$400 was the proper balance. This satisfactorily explains the receipt, and, we think, is the true state of the case. Owens afterwards paid the \$400, and received a deed for an undivided third part of the property. In taking the account, no notice need or should be taken of the \$100 paid by Owens to Staples, nor of the payment by Owens to Collins & Langworthy of his third part of the purchase-money.

This, then, being an equal partnership between these partners, it is manifest that an account of debtor and

creditor, stated between Owens on one side, and Collins & Langworthy on the other, can lead to no correct results. A correct adjustment of the account involves, first, an inquiry whether any profits accrued from the adventure. This can only be known by ascertaining what was the gross income of the partnership; and in making this investigation, the register will include the entire income, whether received by one partner or another. Then he must ascertain the entire expenses of the partnership, including an allowance to Owens for his services according to the contract. The difference between these two amounts will show whether the partnership made any profits,—and if so, the amount. Private dealings between the partners, not being income of, or outlay for the firm, and private advances of money, do not enter into this feature of the account. The question on this investigation is, has there been profit or loss? and how much? After ascertaining whether there has been profit or loss, and the amount of it, it follows necessarily that each partner must share equally in this profit or loss. Or, the *status* of the firm may be ascertained, by stating a separate account of each member *with the firm*; not with any other member of it. From the results of these several accountings, the register can readily learn whether there have been profits, and the amount of them.

When the amount of profit or loss is known, an account with each member will become necessary, to enable the register to apportion the profits, or equalize the losses. Collections and disbursements by each, and advances made by one to another, will enter into this account.

It is manifest from what we have said above, that the entire account in this case rests on an unsound basis, and that it must be retaken.—*Zimmerman v. Huber*, 29 Ala. Rep. 379.

Several of the items in the account, even if the same had proceeded on a correct basis, seem to be improper. We mention only the following: Collins & Langworthy are charged for Patrick's hogs, \$80. The answer of Owens (page 25 of the record) says, the hogs were sold and proceeds divided between the partners.



The decree of the chancellor, in overruling the exceptions to the register's report, is reversed,—and the cause is remanded to be proceeded in according to the principles of this opinion.

## BUCKLEY vs. CUNNINGHAM.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Hearsay inadmissible.*—A witness cannot be allowed to testify, that a certain fact existed, as he understood at the time.
2. *Mode of proving opinion of physician.*—A physician cannot be allowed to state, that, after making a professional visit to the slave whose soundness is in controversy, he expressed the opinion to plaintiff that the slave must have been unsound when purchased by him.
3. *Motion to suppress deposition on account of insufficiency of answers to cross interrogatories.*—A deposition will not be suppressed, "on the ground that the witness has not answered fully and fairly the cross interrogatories," when all the questions appear to have received a substantial answer, and nothing is shown which would justify the conclusion that the witness was seeking to evade a disclosure of facts within his knowledge, or of his professional opinions.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by Wm. L. Buckley, against Columbus Cunningham and LaFayette Morrow, to recover damages for a breach of warranty of the soundness of a slave, named Will. The only plea was the general issue. On the trial, as appears from the bill of exceptions, the plaintiff offered in evidence the depositions of Dr. F. A. Ross, Dr. J. C. Nott, John P. Smith, and Wm. McCall. Dr. Ross' deposition contained the following (with other) statements: "On the 19th March, 1856, I was called upon to visit a negro man, named Will, owned by Capt. W. L. Buckley, and then recently purchased by him, as I understood at the time. \* \* \* At the time when I first saw the negro, I did not think that he presented a healthy appear-

ance, although he seemed rather stout; and *I expressed the opinion to Capt. Buckley, that I did not think, from what the boy told me on my first examination of him, that he could have been sound when he purchased him.*" The italicized portions of these statements were excluded by the court, on the defendants' objection, and the plaintiff excepted. The witness Smith testified, among other things, as follows: "*I understood that it became necessary to favor him [the slave] from the most laborious parts of his duties, and that he was put under the care of a physician at Mobile ;*" and the witness McCall likewise testified, "*I understood he was sent to Dr. Nott's hospital.*" These portions of each deposition were excluded by the court, on the defendants' motion, and the plaintiff excepted. The plaintiff also moved the court to suppress the deposition of Dr. Hendrix, a witness examined by the defendants, "on the ground that he had not answered fully and fairly the cross interrogatories propounded to him by plaintiff," and reserved an exception to the overruling of his motion. The deposition of W. W. Knox was also taken by the defendants; the third interrogatory, with the answer thereto, being as follows: "State all you may know beneficial to the defendants, or going to show that said negro was sound on the 8th December, 1855." *Ans.* "I know nothing more that would benefit the defendants, except that said negro, up to the time when he was sold by Bowie and left this county, which was in the summer or fall of 1855, had the appearance and habits described in the answer to the second interrogatory." The plaintiff moved the court to suppress this answer, "on the ground that it was illegal and irrelevant evidence," and excepted to the overruling of his motion. The rulings of the court on the evidence, as above stated, are now assigned as error.

BYRD & MORGAN, for appellant.

JAMES B. MARTIN, *contra.*

R. W. WALKER, J.—Those parts of the depositions of Smith and McCall which were excluded by the court, were mere hearsay, and therefore properly rejected. So,

also, was that part of the deposition of Ross, in which he refers to the negro Will as one recently purchased by Buckley, *as he understood at the time*.

[2.] The statement of the same witness, that after his visit to the negro, he expressed the opinion to Buckley that the boy could not have been sound at the time Buckley purchased him, was clearly inadmissible.

The answer of the witness Knox to the last interrogatory was responsive to the question propounded, and the facts there stated were relevant testimony.

[3.] The answers of Hendrix to the cross interrogatories are certainly not chargeable with redundancy; but, upon a careful examination of them, it appears that all the questions receive a substantial answer; and as we can discover nothing which would justify us in concluding that the witness was seeking to evade the disclosure either of his knowledge of the facts, or of his professional opinion, we think that the court committed no error in refusing to suppress his deposition.—*Spence v. Mitchell*, 9 Ala. 744; *Nelson v. Iverson*, 24 Ala 9.

The judgment is affirmed.

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## EX PARTE BEAVERS.

[APPLICATION FOR MANDAMUS TO STRIKE CAUSE FROM DOCKET.]

1. *Rule of construction of judgments and orders of court.*—The general rule of construction, applicable to statutes, contracts and wills, which requires that effect should, if possible, be given to every word and clause, applies with peculiar force to the judgments and orders of courts of record.
2. *Construction of order granting new trial.*—On motion for a new trial, an order in these words, viz., “It is considered that said motion be granted, upon the payment of all the costs in the case, and the costs of this motion, within ninety days; for which let execution issue,”—is an absolute, unconditional grant of a new trial.

APPLICATION for a *mandamus* to the circuit court of Talladega, Hon. ROBT. DOUGHERTY presiding, to compel



that court to strike from its docket a cause wherein Graham Beavers, the petitioner, was plaintiff, and John T. Hardie & Co. were defendants. The facts on which the application was predicated, as shown by the accompanying transcript, are these: At the November term, 1857, a judgment on verdict was rendered in said cause for the plaintiff. On a subsequent day of the term, the defendants submitted a motion for a new trial; whereupon an order was made by the court, in the following words: "It is considered that said motion be granted, upon the payment of all the costs of the case, and the costs of this motion, within ninety days; for which let execution issue." When the cause was called at the next term of the court, "the plaintiff suggested to the court that the case had been finally disposed of at the last term;" and also moved to strike the cause from the docket, "because the costs had not been paid within the time prescribed by the former order of the court;" and, in support of his motion and suggestion, produced and read from the record the judgment rendered at the previous term, and the order above set out; "insisting that said order was null and void, at least after the close of the term at which it was made, and that the terms on which said order was granted had not been complied with within the prescribed time." The defendants then proved, by the clerk of the court, an agreement between him and their attorney relative to the payment of the costs; which agreement the court considered equivalent to an actual payment of the costs, and therefore overruled the plaintiff's motion; to which ruling the plaintiff excepted, and on which he founds his present application.

JAS. B. MARTIN, and B. T. POPE, for the motion.

PARSONS & J. WHITE, *contra*.

WALKER, J.—In reference to the motion for a new trial, the order was as follows: "It is considered that said motion be granted, upon the payment of all the costs in this case, and the costs of this motion, within ninety days, *for which let execution issue*." If the words

italicized had been omitted, the order would have prescribed the payment of the specified costs as a condition precedent to the grant of a new trial. The effect of such an order as this would be, without the words "for which let execution issue," is settled in this State by the decisions in the cases of *Ex parte Lowe*, 20 Ala. 330; and *Willis v. Planters' & Merchants' Bank of Mobile*, 19 Ala. 141. See, also, *Edwards v. Lewis*, 18 Ala. 494; *Walker v. Hale*, 16 Ala. 26; *Reese v. Billing*, 9 Ala. 260; *Stephens v. Brodnax & Newton*, 5 Ala. 258; *Stephenson v. Mansony*, 4 Ala. 317.

In the presence of the words directing the issue of execution, this order differs from all the others which have been held to prescribe a condition precedent. It is a cardinal rule in the construction of statutes, deeds, wills and other instruments, to give effect, if possible, to all their parts.—*Miller and Wife v. Flournoy's Heirs*, 26 Ala. 724; *Gibson v. Land*, 27 Ala. 117; *Petty v. Booth*, 19 Ala. 633; *Smith on Stat.* 646, § 501; 1 *Black. Com.* 89. Blackstone's statement of the principle of construction is, that one part of a statute must be so construed by another, that the whole may, if possible, stand; *ut res magis valeat, quam pereat*. In the contemplation of this rule, a clause may, for the sake of allowing effect to some other part of the same instrument, receive a construction different from that which would have been adopted, if it had stood alone. Otherwise, the rule would be vain and useless.

If the principle of construction, which we have announced, be correct in reference to statutes, contracts, and wills, it is applicable with peculiar force to the judgments and orders of courts of record, which must be supposed to act with great solemnity and deliberation. That would, indeed, be a violent presumption, which would attribute to such tribunals a want of design in any of the parts of their solemn judgments, or the absurdity of inserting irreconcilably conflicting judicial commands in the same entry. The order now before us must, therefore, if possible, receive such a construction, that all its parts may stand and have a meaning.

The order that a new trial be granted upon the payment

of the specified costs, would, under our decision, make a compliance with the condition by the payment of the costs optional with the party. The condition of such an order would be one for his benefit, which he might accept or waive.—Walker v. Hale, 16 Ala. 27; Stephenson v. Brodnax & Newton, 5 Ala. 258. No execution could issue upon such an order. Process could not issue to compel the performance of an act which is optional. If, then, the order is understood as granting a new trial upon condition precedent, the court, in directing the issue of an execution, has done that which was wrong, and commanded that to be done which cannot be done consistently with the antecedent part of the order.

It is manifest that the order for the issue of execution can have no effect, if the grant of new trial was conditional. We find the latter as well as the former clause in the order. The record of the court announces the one as well as the other. Are we to discriminate between the two, and say that the former must stand, and the latter be rejected? that we are to regard the former as the sole exponent of the meaning of the court, and that the court meant nothing in directing its clerk to issue execution? We are certainly not to do so, if the two clauses may be so construed that they may stand together.

The language of the order, that a new trial "be granted upon the payment of all the costs," has, in other States, been understood not to import a condition precedent, as is admitted by the opinion in Willis v. Pl. & M. Bank, *supra*.—Gilliland v. Rappleyea, 3 Green, (N. J.) 138; Johnson v. Taylor, Reed & Co., 3 S. & M. 92. By understanding the court, in ordering the new trial upon the payment of the costs, to state the terms upon which it was then granted, an effect is allowed to every part of the order, and no greater liberty is taken in the construction of the language than is permissible in order to avoid a total exclusion of a part of the order. Effect is allowed to the prescribing of ninety days, as the time within which the costs were to be paid, by regarding the order as directing the expiration of ninety days as the time at which the payment of costs might be coerced.



Because we regard the order as an unconditional grant of a new trial, we overrule the motion for a *mandamus*, at the costs of the petitioner.

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## FARMER vs. WILSON.

## [AMENDMENT OF JUDGMENT NUNC PRO TUNC.]

1. *Sufficiency of evidence to authorize amendment.*—On motion to amend a judgment *nunc pro tunc*, entries on the court and bar docket, which are *quasi* records, are admissible evidence; and a recital in the amended judgment, that the court is of opinion from an inspection of said dockets, &c., is equivalent to an averment that the court deemed the evidence satisfactory, and is sufficient to sustain the amendment, unless the entries themselves are shown to be insufficient.
2. *Identification of exhibits to record or bill of exceptions.*—Where entries on a docket are intended to be made part of the record, it is necessary that they should either be set out in the bill of exceptions or judgment entry, or be so described and identified as to prevent mistakes by the transcribing officer.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Priscilla Wilson against John T. Farmer and John W. Chisholm, and was founded on the defendants' note under seal for \$162 67. Both of the defendants were served with process. At the return term of the writ, the suit was dismissed as to Chisholm, and a judgment by default entered against Farmer. At the next term, on notice to the defendants, the plaintiff moved to amend this judgment *nunc pro tunc*, as of the preceding term, so as to vacate the order dismissing the suit as to Chisholm, and to enter judgment by default against him. On this motion the court rendered the following judgment: "This day came the plaintiff," &c.; "and it appearing to the court that the said Farmer and Chisholm have had due notice of this motion, and now,

appearing by attorney, oppose the motion to amend as aforesaid; and argument being had for both plaintiff and defendants; and the court being of opinion from the records and dockets, to-wit, the court and bar dockets, which are here made a part of this record of the cause, that judgment by default ought to have been rendered, at the last term, as well against said Chisholm as against said Farmer, and that it was a clerical error dismissing the suit as to said Chisholm, and failing to enter judgment by default against him as it was against said Farmer: It is therefore considered by the court, that the judgment rendered in this cause at the last term be so amended as to set aside that part of it which dismisses the suit as to said Chisholm, and that the plaintiff recover of said Chisholm, as well as of said Farmer, the sum of \$162 67 debt, and the sum of \$11 27 damages, together with the costs, jointly with said Farmer, *nunc pro tunc*." The only entry on the court docket, relative to the case, as copied in the transcript by the clerk, is in these words: "Dismissed as to Chisholm, and judgment by default as to Farmer."

The appeal was sued out by Farmer before the rendition of the amended judgment. The errors assigned are, the rendition of judgment by default against Farmer alone, and the amendment of the judgment *nunc pro tunc*.

JNO. S. & E. W. KENNEDY, for appellant.

R. W. WALKER, and JAS. IRVINE, *contra*.

STONE, J.—If the amended judgment in this record is to be regarded as the judgment, there can be no question that the record is free from error. That judgment is in every respect formal and sufficient. In fact, none of the assignments of error question its sufficiency.

It is urged for appellant, that the circuit court erred in amending the judgment *nunc pro tunc*, because there was nothing in the record to amend by. In reply to this objection, it is contended for appellee, among other things, that the recitals in the amended judgment are sufficient

to sustain it; that what purports to be copies from the court and bar dockets, are no part of the record in this court, and hence there is nothing in the record which authorizes us to hold that the circuit court erred in amending the judgment *nunc pro tunc*. The recitals in the judgment entry are as follows: "The court being of opinion from the records and dockets, to-wit, the court and bar dockets, which are here made a part of this record of the cause, that judgment by default ought to have been entered at the last term of the court, as well against said Chisholm as against said Farmer, and that it was a clerical error dismissing the suit as to said Chisholm," &c.; and the court thereupon rendered judgment against both defendants.

The following authorities are to the point, and show that the court, in considering the motion, had authority to consult the entries upon the dockets, as *quasi* record evidence in the cause; and that amendments, granted upon sufficient evidence drawn from that source, will be upheld. The recital, that the court was *of opinion from the record and dockets*, &c., is a sufficient averment that the court was satisfied: in other words, that the evidence was sufficient and satisfactory.—Yonge v. Broxson, 23 Ala. 684; Glass v. Glass, 24 Ala. 468; Price v. Gillespie, 28 Ala. 279; Rains v. Ware, 10 Ala. 623.

We do not think the portions of the court and bar dockets found in this transcript, are sufficiently identified to authorize us to regard them as a part of the judgment entry, which, in this case, stands for a bill of exceptions. The record (judgment entry) does not set out a copy of them, nor are they so described by marks, parties, or other identifying features, as to leave no room for mistakes in the transcribing officer. The only description given is, "the court and bar dockets, which are here made a part of this record." This description contains no identifying features, but leaves the question of identification to the act and certificate of the clerk. To hold the description in this case sufficient, would be to establish a very dangerous precedent.—Branch Bank v. Mosely, 19 Ala. 222; Bradley v. Andress, 30 Ala. 80; Waring v. Gilbert,



25 Ala. 295; Stodder v. Grant, 28 Ala. 416; Gains v. Beirne, 3 Ala. 114; Saunders v. Camp, 6 Ala. 73; Bostwick v. Beach, 18 Ala. 80.

It has been argued before us, that inasmuch as the judgment *nunc pro tunc* was rendered after this appeal was taken, we cannot, on this appeal, consider the sufficiency of the grounds on which it was rendered; that to bring up that question, a new appeal is necessary. The principles above declared render a decision of this question unnecessary.—See Andrews v. Br. Bank, 10 Ala. 373; Moore v. Horn, 5 Ala. 234.

The judgment of the circuit court is affirmed.

### McKLEROY vs. TULANE.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND.]

1. *Allegations of vendor's bill to enforce lien for unpaid purchase-money.*—Although, under an executory contract of sale, the necessity for a formal tender of a conveyance by the vendor on the appointed day is dispensed with, if the purchaser has previously notified him that he would not take the property; yet, if the vendor afterwards files a bill in equity to have the land sold for the payment of the purchase-money, his bill so far partakes of the character of a bill for specific performance, as to make it necessary for him to show that, on the appointed day, he was, or at least would have been, if the contract had not been renounced by the purchaser, able, ready and willing to make full performance of all the stipulations of the contract on his part.
2. *Construction of executory contract of sale as to stipulations for covenants by vendor.* A stipulation on the part of the vendors, in an executory contract of sale, that they will make, or cause to be made to the purchaser, “a good and sufficient deed or other conveyance or conveyances in the law for conveying and assuring” the property to the purchaser, “which deed or deeds shall contain the usual full covenants and warranty of title of the premises to the party of the second part, free and clear of all liens and incumbrances whatsoever,”—binds them to deliver deeds containing covenants equivalent, in extent and operation, to the covenants of seizin, freedom from incumbrances, and general warranty.
3. *Estoppel en pais against purchaser from alleging insufficiency of vendor's title.* The mere failure of the purchaser to object to the sufficiency of a deed, when informed by his vendor that the deed was ready for delivery on the appointed day, does not estop him from afterwards insisting that the vendor was unable to comply with all the stipulations of his contract, when it is not shown that he ever saw the deed.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by William H. McKleroy, against Paul Tulane and others, and sought to have a tract of land sold for the payment of the purchase-money. The land was bought by McKleroy & Co., a mercantile partnership in Wetumpka, which was composed of the complainant and one Leonard H. Hamilton as equal partners. Hamilton died in New York, in 1846, having executed his last will and testament, wherein he appointed Francis Daniels his executor, and bequeathed his interest in said land to his several brothers and sisters as residuary legatees, to be equally divided between them. Daniels qualified as executor, and, on the 10th October, 1851, jointly with the complainant, entered into a contract for the sale of the land to the defendant. This contract, as exhibited with the bill, was in the following words:

“This indenture, made and executed this 10th October, 1851, between William H. McKleroy and Francis Daniels of the first part, and Paul Tulane of the second part, witnesseth, that the said parties of the first part have agreed to, and do hereby agree that they will sell and convey, or cause to be conveyed, to the party of the second part, the following described property, viz.,” (describing it;) “the price, or consideration, to be \$5,500, payable in cash on the delivery of the deeds. And the parties of the first part covenant and agree, that they will, at their own expense, on the first day of January next, make, execute and deliver, or cause and procure to be made, executed and delivered, to the party of the second part, a good and sufficient deed or other conveyance or conveyances in the law for conveying and assuring to the party of the second part the above-described premises; which deed or deeds shall contain the usual full covenants and warranty of title of the said premises to the said party of the second part, free and clear of all liens and incumbrances whatsoever. And the party of the second part hereby covenants and agrees, that he will purchase the said premises, for the price, and on the terms above set

forth; and that on the first day of January next, on receiving such deed as above stipulated, he will pay in cash to the said parties of the first part the said sum of \$5,500. And it is mutually understood and agreed, that all the covenants and stipulations herein contained shall apply to and bind the respective heirs, executors, administrators and assigns of the said parties to these presents. In witness whereof, the said parties have hereunto interchangeably set their hands and seals," &c.

The bill alleged, in addition to the facts above stated, that said Daniels had no individual interest in said land at the time he entered into this contract, "but merely entered into said contract, and signed said indenture, by way of assurance that the devisees of Hamilton, his testator, should make the conveyance stipulated upon the payment of said money, so far as their undivided half interest in said land was concerned;" that complainant caused a deed to be prepared at his own expense, which he executed jointly with his wife, "and by which his undivided half interest in said land was conveyed by warranty titles to said Tulane;" "that said deed was a good and sufficient deed, and was sent to said Daniels, then in New York city, to be handed by him to said Tulane, prior to said first day of January, pursuant to said agreement;" "that said Daniels received said deed, and obtained deeds to said lot from said Carlos, Christiana and Nancy [the devisees of Hamilton] for their interest, and notified said Tulane that he had the necessary deeds from all said parties, with the usual full covenants and warranty of title to said premises, and was then ready to deliver the same to him, or to deliver them on said first day of January;" "that said Tulane at first expressed himself entirely satisfied with the said deeds, or the deed of complainant," but afterwards, and but a few days before said first day of January, "notified said Daniels that he would not take the said premises;" that said Daniels, in consequence of this refusal on the part of Tulane, did not deem it necessary, on said first day of January, to make a formal tender of said deeds and demand payment of the purchase-money, which he would have done but



for said previous refusal on the part of Tulane; that complainant "did, or offered to do, or caused to be done, all that was necessary and proper for him to do under the terms of said contract;" "that said Daniels was ready, and offered, to do all that was necessary to be done to secure good and warranty titles to the undivided half interest in said lots which had descended to or was vested in said" devisees of Hamilton; that said deeds of complainant and said devisees "would have conveyed a good title to said Tulane, free from all incumbrance whatsoever;" and that said Tulane "expressed himself satisfied with the deed and title of complainant, and did not object in any respect to said titles." Daniels, Tulane, and the devisees of Hamilton, were made defendants to the bill; and the prayer was, for an account of the purchase-money due to complainant, a sale of the land to pay the amount, and general relief.

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

WM. P. CHILTON, and N. S. GRAHAM, for appellant.

ELMORE & YANCEY, and R. M. CHERRY, *contra*.

R. W. WALKER, J.—The agreement alleged in the bill is one founded upon mutual and concurrent conditions: the stipulated conveyance by one party, and the payment of the purchase-money by the other, were to be contemporaneous acts, and each of the contractors was bound to perform on his part at the time fixed.—Whitehurst v. Boyd, 8 Ala. 375; Smith v. Lewis, 24 Conn. 624; Ledyard v. Manning, 1 Ala. 153; Smith v. Christmas, 7 Yerger, 565; 2 Lomax's Dig. 47; 4 Florida, 359.

The contract being a mere agreement on the one side to sell, and on the other to purchase, at a future day, the purchaser was not entitled to the possession of the property, until the performance of the executory contract. Sufferens v. Townsend, 9 Johns. 35; Cooper v. Stower, 9 Johns. 331. In such a case, if the vendee, prior to the time appointed for the payment of the purchase-money and the delivery of the deed, notifies the vendor that he

will not take the property, this will dispense with the formal tender of a conveyance by the latter. And yet, if a vendor, who has received such notice, applies to a court of equity to treat the agreement as an executed contract, and to direct the sale of the property for the payment of the purchase-money, his bill necessarily so far partakes of the character of a bill for specific performance, as to make it essential for him to show that he was able and ready, at the appointed time, to do that which by the agreement he had contracted to do; or, at least, that he was disposed, and, if the contract had not been renounced by the vendee, would have been able, on the day designated, to make full performance on his part. See *Smith v. Lewis*, 24 Conn. 624; *Holmes v. Holmes*, 12 Barb. 627; *Smith v. Christmas*, 7 Yerger, 565.

[2.] The undertaking of Daniels and McKleroy was, that they would make, or cause to be made, to Tulane, "a good and sufficient deed or other conveyance or conveyances in the law for conveying and assuring" the property to Tulane; "which deed or deeds shall contain the usual full covenants and warranty of title of the premises to the party of the second part, free and clear of all liens and incumbrances whatsoever."

We need not discuss the correctness of the position assumed by the chancellor, that there could be no performance of the agreement on the part of Daniels and McKleroy, except by the execution of a joint conveyance by them, with full covenants from each for the whole property; or that, if separate deeds could be allowed, still the covenants of each of the vendors should extend to the whole land, and not to separate moieties. The authorities certainly seem to sustain the proposition, that when several are bound by an executory agreement to make titles to another, all must join in the conveyance, and the covenants of each must extend to the whole land. *Johnson v. Collins*, 20 Ala. 443; *Lawrence v. Parker*, 1 Mass. 191; *Clark v. Redman*, 1 Blackf. 379.

But, however that may be, it is at least clear, that these parties undertook for the execution of deeds to Tulane, which were not only to be sufficient for conveying to him

the premises, but which were also to contain "the usual full covenants and warranty of title." The stipulation on their part relates, not only to the effect, but to the form of the deeds. The deeds are not only to convey a good title, but they are to contain the covenants named. The complainant must show, therefore, that he and Daniels were, or, but for the renunciation of the contract by Tulane, would have been, ready and able at the time appointed to deliver to the latter deeds corresponding, both in substance and in form, to the terms of their agreement.

Where the contract for the sale of real estate is silent upon the subject, the question as to what covenants for title the purchaser has a right to expect, is one to which the authorities are far from furnishing an uniform answer. Rawle's Cov. 559, *et seq.* But this is a matter always subject to be controlled by the express terms of the articles of sale; and, in the present case, the language employed is such as to leave but little room for controversy. Chancellor Kent says, that the usual covenants in a deed are—1st, that the grantor is lawfully seized; 2d, that he has good right to convey; 3d, that the land is free from incumbrances; 4th, that the grantee shall quietly enjoy; 5th, that the grantor will warrant and defend the title against all lawful claims.—4 Kent, 471. According to some authorities, the covenant of seizin embraces the covenant of right to convey; and according to others, the covenant of general warranty includes the covenant for quiet enjoyment, as the same is usually expressed in this country.—Rawle's Cov. 50, 53, 127, 237–8; Caldwell v. Kirkpatrick, 6 Ala. 60.

If these propositions are correct, the covenants of seizin, freedom from incumbrances, and general warranty, would embrace all the others. But these three covenants are distinct and different: each has a field of operation unoccupied by either of the others, and they are distinguishable alike in their objects and effects. The first two are broken, if at all, as soon as the deed is made; while the last, being equivalent to a covenant for quiet enjoyment, is not broken until there is an actual eviction, or some-



thing which the law deems a disturbance of the possession.—4 Kent, 471–2; Mott v. Palmer, 1 Comstock, 564; Anderson v. Knox, 20 Ala. 156; Caldwell v. Kirkpatrick, 6 Ala. 60; Rawle's Cov. 80, 83, 132, 235.

If this agreement had been silent as to the form of the deed, or if it had simply stipulated for a conveyance 'by warranty title,' or for the execution of a deed 'with warranty,' *it may be* that a conveyance which transferred a good title, and contained the covenant of general warranty, would have been deemed sufficient.—Rawle's Cov. 562–3; Rucker v. Lowther, 6 Leigh, 259; Clark v. Redman, 1 Blackf. 379; Hedges v. Kerr, 4 B. Monroe, 528; Bronson v. Cahill, 4 McLean, 19. That, however, is not the question here. The language of this agreement will not allow us to hold, that the contract of McKleroy and Daniels would have been complied with by the execution of deeds containing no other covenant than that of general warranty. They stipulate to deliver deeds which shall contain "the usual full covenants *and* warranty of title." Unless we repudiate all the rules which have been adopted for the construction of written instruments, we must conclude that the parties contemplated something beyond the mere warranty of title; and we hold, that by their contract Daniels and McKleroy bound themselves to deliver deeds containing covenants equivalent, in extent and operation, to the covenants of seizin, freedom from incumbrances, and general warranty.

The bill does not show that the vendors were, or but for the notice received from Tulane would have been, able and ready, on the appointed day, to deliver such deeds. The complainant avers, that he and his wife "conveyed by warranty titles," and that "the deed executed by them was a good and sufficient deed." The allegation in reference to the deeds executed by the devisees of Hamilton is, that Daniels "obtained deeds to the lot from the devisees for their interest." There is no averment that the deeds thus obtained contained the covenants stipulated for. It is true, there is an allegation that Daniels "notified Tulane that he had the necessary deeds from all of the parties, with the usual full covenants

and warranty of title;" but we cannot hold that this is equivalent to an averment that the deeds did in fact contain such covenants. Nor is there any allegation that Daniels could have obtained from the devisees deeds with the required covenants. The 6th paragraph of the bill is obviously insufficient to show that the vendors had offered, and were ready and able, to perform their part of the agreement. The complainant should have alleged specifically what the parties in fact did, so that the court could determine whether the thing done was a compliance with their undertaking.—Cameron v. Abbott, 30 Ala. 416; Norris v. Norris, 27 Ala. 519; Cockerell v. Gurley, 26 Ala. 405.

It is said that Tulane expressed himself satisfied with the deeds, and that therefore he cannot now make this objection. This is a mistake. The bill contains no such averment. The allegations are, that Tulane "*at first* expressed himself satisfied with the deeds *or* the deed of your orator;" and, again, that "he expressed himself satisfied with the deed and title of your orator, and did not object in any respect to such titles." There is no averment that he ever expressed himself satisfied with the deeds from the devisees of Hamilton, nor in fact is there any allegation that he ever saw those deeds. And even if the statement that he "did not object in any respect to said titles," can be considered as referring to the deeds from Hamilton's devisees; still, his mere failure to object would not, under the circumstances disclosed by the bill, operate an estoppel.

The decree of the chancellor is affirmed.

## McLENDON &amp; ROBINSON vs. HAMBLIN.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Onus of proof as to payment.*—In appeal cases from a justice's court, where the sum in controversy exceeds \$20, if the defendant testifies to the fact of payment in support of his plea, and his testimony is contradicted by the plaintiff, (Code, § 2779,) the *onus* is on the defendant to prove the payment: the rule established by the case of *Jordan v. Owen*, 27 Ala. 152, as applicable to cases in which the plaintiff seeks to establish the correctness of his demand by his own oath, (Code, § 2313,) does not apply to such appeal cases.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBT. DOUGHERTY.

THE bill of exceptions in this case is in the following words:

“This was an appeal from a justice's court, and was tried *de novo* in the circuit court, on the pleas of *non assumpsit* and payment. The plaintiffs were introduced as witnesses, under section 2779 of the Code, and swore to the sale and delivery of the goods, as charged in the complaint and shown by their books, and that their said account was just and correct, and unpaid. The defendant was then sworn as a witness, under the same statute, and admitted the purchase and delivery of the goods, as charged and stated by plaintiffs; but he swore that he had paid them \$50, with which they had not credited him, and that the same was therefore paid by said \$50. The plaintiffs were then put upon the stand, and both contradicted the said payment, and swore that they had credited the defendant with all that he had ever paid them, and that said account had never been paid. This being all the proof in the cause, the court charged the jury, ‘that whenever the defendant contradicted the plaintiffs’ oath, it neutralized their oath; and that if the defendant admitted the sale and delivery of the goods by the plaintiffs, but swore that he had paid for them, then the plaintiffs’ oath was contradicted, and it devolved on



them to prove by other testimony that the goods had not been paid for, and the burden of proving that the goods had not been paid for was on them.' To this charge the plaintiffs excepted," and they now assign it as error.

BROCK & BARNES, for the appellant.

C. D. HUDSON, *contra*.

A. J. WALKER, C. J.—As a general rule, the *onus* of proof of a payment is upon the defendant who pleads payment, and consequently it does not usually devolve upon the plaintiff to negative the alleged payment by the defendant. Section 2313 of the Code, under the decision in *Jordan v. Owen*, 27 Ala. 152, establishes an exception to the general rule, so far as to make the negation of payment an element in the establishment by the plaintiff of "the correctness" of his demand by his own oath. The decision of *Jordan v. Owen* rests upon the peculiar language of the statute, and the unreasonableness and injustice of permitting the plaintiff to establish his demand by his own oath without denying the payment, while the defendant is only permitted to controvert by his oath what the plaintiff has asserted.

The second clause of section 2779 of the Code directs that either party may be a witness on his own behalf, unless the adverse party swears that the testimony proposed to be given is untrue. This clause of the section we understand as embracing cases within a justice's jurisdiction, "when the matter in controversy, or damages claimed, exceed twenty dollars." This case falls within that class. The reasoning upon which *Jordan v. Owen*, *supra*, is based, has no application here. The language of the statute is different; and both parties have a common right to testify, "unless the party against whom the testimony is offered, swears that the testimony proposed to be given is untrue." The exclusion by the plaintiff from his testimony of the subject of payment would not preclude the defendant from testifying to a payment. The statute is essentially different from that construed in *Jordan v. Owen*, and that decision can have no influence in

its construction. In cases falling within the second clause of section 2779, the *onus* of proving payment is upon the defendant; and if his testimony in support of the payment is contradicted by the oath of the plaintiff, asserting that such testimony is untrue, the plea of payment is unsustained, unless other evidence be adduced.

The judgment of the court below is reversed, and the cause remanded.

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### O'GRADY vs. JULIAN.

[ACTION TO RECOVER DAMAGES FOR WRONGFUL AND MALICIOUS ATTACHMENT.]

1. *Relevancy of evidence to prove damages sustained.*—In an action to recover damages for the wrongful and malicious suing out of an attachment against a merchant, the plaintiff cannot be allowed to prove “what was the usual profit made by such establishments in the neighborhood of the plaintiff in the same kind of business.”
2. *Mode of proving damages.*—A witness may be asked to state, from his own knowledge, “what was the effect of the issue of said attachment, and the seizure and levy under the same, upon the business and credit of the plaintiff.”
3. *Burden of proof as to probable cause for suing out attachment.*—In this action, the *onus* is on the plaintiff to prove the falsity of the affidavit on which the attachment was sued out, and not on the defendant to prove its truth.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by P. A. Julian, against Dominick O'Grady, to recover damages for the wrongful and malicious suing out of an attachment. The plaintiff was a merchant in Mobile at the time when the attachment was sued out against him, and was indebted to the defendant in the sum of about \$85; and the ground on which the attachment was sued out was, that he was about to dispose of his property fraudulently. The

defendant pleaded not guilty, and justification; and the cause was tried on issues joined on these pleas.

"On the trial," as the bill of exceptions states, "the plaintiff asked one of his witnesses, (after offering proof to the jury tending to show the extent of his business, as to the amount of sales made by him per week, or per month,) 'what was the usual profit made by such establishments in the neighborhood of the plaintiff in the same line of business.' The defendant objected to this question; the court overruled his objection, and he excepted."

"The plaintiff also asked one of his witnesses, 'what was the effect of the issue of said attachment, and the seizure and levy under the same, upon the business and credit of the plaintiff.' To this question the defendant objected, as calling for the opinion of the witness; to which objection it was replied, that the opinion of the witness was not called for, but the facts within his knowledge. The court overruled the objection, and permitted the question to be asked; to which the defendant excepted. In answer to said question the witness stated, that the issue and levy of the attachment had a serious effect; that it broke up the plaintiff's business, destroyed his credit, prevented the renewal of his notes then running to maturity, and caused the withdrawal of his credit by the parties with whom he had been in the habit of dealing. This the witness stated as facts within his knowledge, and not as matter of opinion."

"The court charged the jury, among other things, that it devolves on the defendant in this action to sustain the truth of the affidavit which he made in the attachment suit, and not on the plaintiff to show it untrue, if, on the other points in the case, they are of opinion that the plaintiff ought to recover. To this charge the defendant excepted, and requested the court to instruct the jury, that the plaintiff must show by some evidence that the affidavit was false, unless the defendant made the affidavit with a purpose to vex or harass the plaintiff, before the burden of proof can be shifted upon the defendant to sustain the truth of the affidavit; which charge the court refused to give, and the defendant excepted."



The rulings of the court above stated, with other matters, are now assigned as error.

WM. G. JONES, and CHAMBERLAIN & HALL, for appellant.  
JOHN T. TAYLOR, *contra*.

STONE, J.—In receiving proof of “what was the usual profit made by such establishments in the neighborhood of the plaintiff in the same kind of business,” the city court clearly erred. Such testimony could furnish no reliable data for determining the loss sustained by plaintiff; while its tendency was to multiply the issues before the jury almost indefinitely.—*Gilmer v. City Council*, 26 Ala. 665-9; *Hubbard v. And. and Ken. R. R. Co.*, 39 Maine, 506; *Standish v. Washburn*, 21 Pick. 237; *Heywood v. Decreet*, 4 Gray, 111.

[2.] There are some embarrassments thrown around the second exception of the appellant. The plaintiff below, against the objection of the defendant, was permitted to ask a witness, “what was the effect of the issue of said attachment, and the seizure and levy under the same, upon the business and credit of the plaintiff?” After this question was objected to, the plaintiff stated that he did not call for the opinions of the witness, but only for his knowledge. This renders it unsafe to announce any opinion adverse to the legality of the question, as it was certainly the right of the plaintiff to prove by witnesses all *actual damage they knew* he had sustained from the issuance and levy of the attachment. The answer given was not excepted to.—See *Donnell v. Jones*, 13 Ala. 490. This question will probably not again arise in the form now presented.

[3.] The charge of the court, “that in this action, it devolves on the defendant to sustain the truth of the affidavit which he made in the attachment suit, and not on the plaintiff to show it untrue,” as also the refusal of the court to give the charge asked by the defendant, raise the question of *onus* in actions such as this. We have not been referred to any decision which sustains this view, nor have we found any.

The analogy between suits like the present, and suits for malicious prosecution, is very striking.—See *Wilson v. Outlaw*, Minor's Rep. 367; *Kirksey v. Jones*, 7 Ala. 622. In 2 Greenlf. Evidence, § 454, it is said: "The want of probable cause is a material averment, and though negative in its form and character, it must be proved by the plaintiff, by some affirmative evidence; unless the defendant dispenses with this proof, by pleading singly the truth of the facts involved in the prosecution."—See, also, 1 Greenl. Ev. §§ 80, 81, 78; *Drake on Attachments*, §§ 729, *et seq.*

Under this rule, the *onus* was on the plaintiff to give some evidence to the jury of the falsity of the affidavit, or of circumstances from which that body could infer its falsity, before the defendant could be called on to sustain the truth of his affidavit. The plaintiff's right to recover depended on the vexatious or wrongful use of the process; and to make this out, the laboring oar was, in the first instance, with him.

Judgment of city court reversed, and cause remanded.

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## WALTHALL'S EX'RS *vs.* RIVES, BATTLE & CO.

### [CREDITOR'S BILL TO HAVE MORTGAGE DECLARED VOID OR FORECLOSED.]

1. *Allegations of creditor's bill, and how to take advantage of defect.*—It is a necessary allegation of a creditor's bill that the complainant is a creditor of the defendant; and the want of such an allegation is a defect which is available on the hearing.
2. *What relief may be had under creditor's bill.*—A creditor may file his bill with a double aspect; asking to have a mortgage, executed by his debtor, declared fraudulent and void, or, if not fraudulent, foreclosed for his benefit; but he cannot have a foreclosure, when his bill alleges that the mortgage has been satisfied and discharged.
3. *Validity of mortgage.*—A mortgage, given for the indemnity of a surety, is not rendered fraudulent and void on its face as to creditors, by the insertion of a clause conferring on the mortgagee a discretionary power of sale for his own protection; nor by a recital that sundry judgments have

already acquired a lien on the property, which the mortgagor has no desire to avoid; nor by a reservation to the mortgagor of the property exempt from levy and sale under execution at law.

4. *Responsiveness of answer, and effect as evidence.*—An answer responsive to an interrogatory, as to any matter relevant to the allegations or charges of the bill, is evidence against the complainant, and throws on him the burden of disproving it.
5. *Estoppel against mortgagee from buying property under older lien.*—The acceptance of a mortgage does not estop the mortgagee from purchasing the mortgaged property under judgments having a lien paramount to that of the mortgage.
6. *Remandment of cause, on reversal, for amendment of bill.*—When an objection to the equity of a bill, founded on the want of a necessary allegation, is overruled by the chancellor, and his decision on that point is reversed on error, the appellate court will remand the cause, in order that the complainant may apply for leave to amend his bill.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Rives, Battle & Co., commission-merchants in Mobile, against Richard B. Walthall and Thomas H. Hill; and sought to have a mortgage, executed by said Hill to his co-defendant, declared fraudulent and void as to complainants, or foreclosed for their benefit. The complainants obtained two judgments against said Hill, one on the 2d, and the other on the 24th February, 1846, on which executions were issued and returned "no property found;" but, in describing these judgments, the bill nowhere averred that said Hill was the defendant therein. Hill's mortgage to Walthall, which was made an exhibit to the bill, was executed on 22d February, 1846; purported to be given for the purpose of indemnifying Walthall against liability as surety and accommodation endorser for Hill on debts amounting to over \$13,000, most of which were then past due; recited that there were executions against Hill then in the sheriff's hands, amounting to about \$10,000, "which executions have already acquired a lien on his property, and the payment of which he has no disposition or desire to avoid;" and conveyed to the said Walthall a tract of land containing four hundred and ninety acres, together with about sixty negroes, a lot of horses, mules



and cattle, farming utensils, household and kitchen furniture, corn and fodder, &c., upon the following trusts:

“To have and to hold the said lands, and the said slaves, with the increase of the females, and the said personal property, (saving and excepting such as is exempt from levy and sale under execution by the laws of this State,) to the said Richard B. Walthall, his heirs, executors, administrators and assigns; *in trust*, nevertheless, for the following uses and purposes—that is to say: That the said Walthall is hereby authorized and empowered, to proceed in the manner, and as soon as he, in his discretion, shall deem best for his security in the premises, to sell and dispose of all the said property, real and personal, (which may remain unsold under the execution hereinafter mentioned,) at public outcry, for cash, at the residence of said Hill, (having first given at least thirty days notice of the time and place of such sale, by advertisement posted at the court-house door of the county first aforesaid, and at Greensboro' and Newbern in the county of Greene,) and upon such sale to execute and deliver good and sufficient deeds and bills of sale of said property, and all the instruments of conveyance proper to effect the sale and transfer of all and every portion of said property; and with the proceeds of such sale the said Walthall shall pay all the just and reasonable expenses and charges of making and carrying into effect this assignment and the objects thereof, and the residue of the proceeds of said sales shall be considered as the net avail and proceeds of the property and effects herein and hereby assigned; and out of the said net avail and proceeds of such sales the said Walthall shall pay off and discharge in full the whole amount of the said bills of exchange hereinbefore described, which were by the said Walthall accepted or endorsed for the accommodation of said Thomas H. Hill, together with all of such costs and damages as have or may accrue thereon by reason of the non-payment thereof at maturity. The said Walthall shall also pay out of such net proceeds one-half of the said bills of exchange and judgments hereinbefore mentioned, on which the said Walthall is jointly liable as surety and endorser with

said Hill, together with one-half of the costs and damages which may have accrued thereon by reason of the non-payment of said claims; and if there should be a surplus remaining after the full payment and satisfaction of the expenses and charges aforesaid, and of the aforesaid bills of exchange and judgments, then the said Walthall shall pay the same to the said Hill, his heirs, executors, administrators and assigns. And the said Richard B. Walthall, the assignee herein named, in consideration of the covenants and assignments herein contained, doth hereby accept the said assignment, and doth covenant with the said Thomas H. Hill, by these presents, that he will, with diligence and fidelity, execute, perform and fulfill all and singular the trusts reposed in him, according to the terms of this indenture. In testimony whereof," &c. (Signed by both parties.)

Walthall answered the bill, and incorporated in his answer a demurrer for want of equity. On his death pending the suit, his executors were brought in by bill of revivor and supplement. The chancellor overruled the demurrer, and, on final hearing on the merits, rendered a decree for the complainants; setting aside the mortgage to Hill, ordering an account, &c. The overruling of the demurrer, the final decree on the merits, and other matters which require no particular notice, are now assigned as error.

I. W. GARROTT, and WM. M. BROOKS, for appellant.

J. R. JOHN, and P. LOCKETT, *contra*.

A. J. WALKER, C. J.—The complainants' bill contained no equity, unless they were creditors of the defendant, Thomas H. Hill. In the absence of that fact, they have no ground whatever upon which to come into court. The bill does not aver that fact, and is, therefore, wanting in equity. This defect was available on the hearing, as are all defects which affect the equity of the bill. Because the bill was thus wanting in equity, the decree of the chancellor in favor of the complainants was erroneous, and must be reversed.

Anxious to abridge, as far as we can, the litigation in this case, we proceed to consider the questions, which are likely to arise in the court below, after the defect above noticed is remedied by amendment, so far as we can anticipate their form and shape.

[2.] There are two distinct alternative claims to relief, which the complainants set up. The first is, that the mortgages described in the bill are void, and should be declared void. The second is, that the mortgages, if not fraudulent, should be foreclosed, and the surplus, after the satisfaction of the secured debts, should be appropriated to the discharge of the complainants' judgment. The granting of those two kinds of relief certainly pertains to the jurisdiction of the chancery court.—*Dargan v. Waring*, 11 Ala. 988; 1 *Hilliard on Mort.* 365, § 14, note *c*; 2 *ib.* 117, note *d*; *Chambers v. Mauldin*, 4 Ala. 477; *Cullum v. Erwin*, *ib.* 452; 1 *Powell on Mort.* 256, n.

The bill could not authorize the grant of the latter relief to the complainants, because it avers, in the 22d paragraph, that the mortgage debts are discharged, either by the receipts of Walthall, or of Hill as his agent, and for his benefit, out of the profits from the mortgaged property. Before the complainants can be let in to redeem, and be substituted to the right of the mortgagee in a foreclosure, it must appear that the mortgages were valid and outstanding. The complainants cannot, in opposition to the case made by the bill, have a foreclosure for their benefit of the mortgages.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

[3.] The mortgage of 22d February, 1845, contains a clause, authorizing and empowering the mortgagee to proceed in the manner, and as soon as he in his discretion shall deem best for his security in the premises, to sell and dispose of all the property conveyed. The instrument is a mortgage to Walthall, designed to save him harmless and free from all loss or damage by reason of his liability as surety of the mortgagor, and his liability as co-surety of the mortgagor for the mortgagor's share of common debts. The mortgage contains a power of sale, and authorizes the mortgagee to sell and pay off the debts



without any prior subjection to their payment. A provision in such a mortgage, that, as soon as the mortgagee in his discretion should deem it best for his security, he might sell and appropriate the proceeds to the payment of the specified liabilities, was by no means a reservation for the benefit of the grantor. It was rather a stipulation, which excluded the mortgagee from a consideration of the mortgagor's interest in fixing the time of sale, and directed him to look to his own protection in the exercise of his discretion. The investing of the mortgagee with such a discretionary power as to the time of the sale, does not, *per se*, vitiate the mortgage.—Shakelford v. P. & M. B'k of Mobile, 22 Ala. 238; Evans v. Lamar, 21 Ala. 333; Abercrombie v. Bradford, 16 Ala. 560; Ashurst v. Martin, 9 P. 566. Such a provision does not place the other creditors of the mortgagor at the mercy, or under the control of the mortgagee. For, if he should fail to act *bona fide*, and exercise his discretionary power within a reasonable time, chancery would afford an adequate remedy.

Neither the recital that there are sundry judgments which have acquired a lien upon the property, and which the grantor has no desire to avoid, nor the exception from the mortgage of the property exempt from execution, is sufficient to sustain the imputation of fraud. It might be altogether proper to disclose in the mortgage the existence of any paramount liens; and certainly outside creditors cannot be prejudiced by the exclusion of property which the law places beyond their reach.

[4.] The answer of a defendant to an interrogatory, as to any matter relevant to the allegations or charges of the bill, is certainly evidence against the complainant.—Fenno v. Sayre & Converse, 3 Ala. 458-479; Br. Bank v. Marshall, 4 Ala. 60-64; Hogan v. Smith, 16 Ala. 600-602; Powell v. Powell, 7 Ala. 582; 3 Green. on Ev. §§ 284-285. Tested by this principle, the answer of Hill, as to the consideration of the debts named in the mortgage, was evidence against complainants, and threw upon them the *onus* of proof.

[5.] Upon the principle settled in Randolph v. Carlton,

8 Ala. 606, the mortgagee, Walthall, was not estopped by his acceptance of the mortgage from purchasing the property conveyed by the mortgage, under judgments having a paramount lien to the mortgage. And if it should appear, in the further progress of this case, that he made such purchase, he would establish a title beyond the reach of the complainants.

The taking of other proof, and the making of amendments to the pleadings, may so far alter the other questions involved in this case, that it would be improper for us to attempt to decide them. Indeed, our anxiety to lessen the area of strife in the court below may already have induced us to venture too far, in anticipating the questions which will arise in the court below.

[6.] The want of an averment that the complainants were creditors of Hill, was made the point of an objection to the bill in the court below, and was overruled by the chancellor. If the objection had been sustained, the complainants could have made an application for leave to amend, and the chancellor would probably have allowed it. In such a case, we think it a proper practice to remand, in order that the complainant may have an opportunity to make the application for an amendment which was rendered apparently unnecessary by the ruling in his favor.

The decree of the chancellor is reversed, and the cause remanded.

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## MAHONEY vs. O'LEARY.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *When exception is necessary.*—The action of the circuit court, in striking out a plea in abatement as frivolous, cannot be revised on error, when no objection or exception was reserved to it.
2. *When premature commencement of action is not available on error.*—The premature commencement of an action, when not objected to in the court below, is not available on error, (Code, § 2405,) if the complaint contains a substantial cause of action.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. WM. M. BROOKS.

THIS action was brought by Eugene O'Leary against Patrick Mahoney, and was founded on the defendant's promissory note for \$457 30, dated the 27th February, 1858, and payable one day after date. The summons was issued on the 1st March, 1858. At the return term, the defendant pleaded in abatement, on account of the premature commencement of the action, and also demurred to the complaint on the same ground. The plea was entitled of the spring term, 1858, and was duly sworn to before the clerk on the 2d April; but the record does not show that the time of filing was endorsed on it by the clerk. The judgment of the court is as follows: "This day came the parties, by their attorneys; and on motion of the plaintiff, and it appearing to the court that the plea filed by the defendant is frivolous, it is therefore considered by the court, that the plea be struck out; and the defendant failing to plead over, it is therefore considered by the court, that the plaintiff recover of the defendant the sum of \$460 for his damages," &c.

The errors assigned are—1st, the action of the court in striking out the plea as frivolous; 2d, the rendition of judgment against the defendant without allowing him a trial on his plea; 3d, the rendition of judgment against the defendant without disposing of his demurrer; and, 4th, the rendition of judgment for the plaintiff on the facts disclosed by the record.

J. T. JONES, and S. F. HALE, for appellant.

J. D. WEBB, *contra*.

STONE, J.—It is settled in this State, that when a contract for the payment of money, not entitled to grace, is dated on Saturday, and is due one day after date, it is in law due and payable on the Monday following; and a suit instituted on such contract on the Monday following, is prematurely brought.—*Randolph v. Cook & Ellis*, 2 Porter, 286; *Sanders v. Ochiltree*, 5 Porter, 73. The note sued on



in this case bears date Feb. 27th, 1858, and was due one day afterwards. February 28th, 1858, was Sunday, and the suit was commenced on Monday, March 1st, 1858.

There is copied in this record a plea in abatement, setting forth the premature institution of the suit; which plea is unobjectionable in form. This plea was sworn to, within the time allowed for pleading; but the record contains no evidence that it was filed in time. The judgment entry bears date April 24th, 1858, and recites, "This day came the parties, by their attorneys; and on motion of the plaintiff, and it appearing to the court that the plea filed by the defendant is frivolous, it is therefore considered by the court, that the plea be struck out." We are now asked to affirm this judgment, because, it is said, the record furnishes no evidence that the plea was endorsed by the clerk when filed.—Code, § 2247.

We do not think this position sound. The record recites, that the plea was struck out as frivolous. This repels the inference that the court rejected the plea for want of the clerk's endorsement. The record, for this purpose, sufficiently shows that the plea in the record is the one upon which the court acted.—Reid v. Nash, 23 Ala. 733.

While it has been uniformly held, that the refusal of the court to strike out a plea is not revisable, because the party can resort to his demurrer, it has been conceded, that if a plea was improperly stricken out, such action could be reviewed in this court.—See Williams v. Hinkle, 15 Ala. 713–717, and authorities cited; Duncan v. Hargrove, 22 Ala. 150, 161. We think there exists good reason for the distinction.

In Stewart v. Goode, 29 Ala. 476, a question very like this was considered. The record in that case showed, that the primary court had permitted the complaint to be amended, in a particular which, it was here contended, should not have been allowed. The record disclosed the character of the amendment, and the action of the court upon it. There was no bill of exceptions. We there said, "The defendant cannot be permitted to revise the action of the court below in allowing the amendment of

the complaint, when he was actually before the court in which the amendment was made, made no objection, and now for the first time questions the correctness of the ruling of the court in reference to the amendment." See, also, *Bryan v. Wilson*, 27 Ala. 214.

In this case, the record recites, that the parties came, by their attorneys; and it does not appear that the defendant interposed any objection or exception to the ruling of the circuit court. We hold, that he cannot for the first time raise the objection in this court. We make this decision the more readily, because it is supported by the opinion pronounced in *White v. Toncray*, 9 Leigh, 347; and *Swafford v. Whipple*, 3 Iowa, 261. A different rule prevails when pleadings are pronounced defective on demurrer. This case, then, must be considered and disposed of, as if no plea in abatement had been interposed by the defendant.

We are aware that the question in the case of *Randolph v. Cook*, 2 Porter, *supra*, was presented on error, and without any plea filed. This court in that case consulted the writ; and, because its date showed the suit to have been prematurely brought, reversed the cause. That case was decided under the statute of 1824, (Clay's Digest, 322, § 53,) which enacts as follows: "No cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to: *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon."

To bring a case within the healing influence of this statute, the declaration must contain *a substantial cause of action*, and *a material issue* must be *tried thereon*. But one of these elements was found in the case of *Randolph v. Cook*, (2 Porter, 286,) and hence the statute did not apply. There was no issue tried on the declaration. It is true that the act of 1824 is not mentioned in the case of *Randolph v. Cook*. Any mention of that statute in that case would have been unnecessary, because the case was not within its influence.

The provisions of the Code, which must determine this

case, are much more liberal. Section 2405 declares, that "No judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action." The complaint in this case does contain a substantial cause of action. It has no date, but is headed, "Circuit court of Greene county, spring term, 1858." We judicially know, that the spring term of Greene circuit court did not sit until long after March 1, 1858.

It is true that the summons in this record bears date March 1; but, under the section of the Code above copied, we have no authority, the complaint being good, to *arrest, annul, or set aside* the judgment, for any matter not previously objected to. The principles declared above prohibit us from looking at the plea in abatement for any purpose; and hence we must hold, that the premature institution of this suit is a matter not previously objected to.—See *Stewart v. Goode, supra*; *Blount v. McNeill*, 29 Ala. 473; *Steamboat Farmer v. McCraw*, 31 Ala. 659.

This opinion is not opposed to any principle decided in *Randolph v. Cook, supra*.

The judgment of the circuit court is affirmed.

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## READ & CO. *vs.* SPRAGUE & MCGOWN.

[BILL IN EQUITY FOR MARSHALING ASSETS OF INSOLVENT PARTNERSHIP.]

1. *Conflicting liens of attachment at law and equitable writ of seizure*.—If a sheriff, having in his hands an attachment at law, receives a writ of seizure issued by the chancery court, before he has levied the attachment, he can only execute the chancery process, unless he can find property not embraced in the writ of seizure, on which to levy the attachment.

APPEAL from the Chancery Court of Tuskaloosa.

Heard before the Hon. JAMES B. CLARK.



THE material facts in this case are the following:

On the 30th September, 1850, George W. and Jehial Read, a mercantile firm in the city of New York, sued out an attachment, before the clerk of the circuit court of Tuskaloosa county, against the estate of George Sprague, as an absconding debtor. The attachment was returnable to the spring term of said circuit court, 1851; was placed in the hands of the sheriff on the same day it was issued, and was levied by him on the next day, to-wit, the 1st October, 1850, on a stock of goods belonging to said Sprague, which had been left by the latter in the care and custody of one Cummings, who was his clerk. Such proceedings were afterwards had in the attachment suit, that, at the fall term of said circuit court, 1851, the plaintiffs recovered a judgment against said Sprague for the amount of their debt, with damages and costs.

On the 1st October, 1850, Henry McGown filed a bill in equity, in the chancery court at Tuskaloosa, against said George Sprague; alleging, that he and said Sprague, prior to the 4th February, 1850, were partners in trade, doing business in the city of Tuskaloosa under the name and style of Sprague & McGown; that said partnership was dissolved on that day,—McGown selling out his entire interest in the firm to Sprague, and the latter agreeing to pay all the outstanding debts of the partnership; that Sprague brought out from New York, in the spring of 1850, after the dissolution, a new stock of goods, and mingled them with the old stock; that he continued the business in his own name, until within a month before the filing of the bill, when he left Tuskaloosa, ostensibly for the purpose of buying goods in New York; that, in fact, he absconded for the purpose of avoiding the payment of his debts; and that he left no property or effects, except the stock of goods on hand and the debts due to him from his customers, which the complainant believed to be insufficient to pay his debts and the debts of the late firm. The bill prayed that an attachment, or writ of seizure, might be issued; that all the goods, together with the accounts and other evidences of debt, might be seized, and held subject to the further order of

the court; that an account might be taken, to ascertain what portion of the goods on hand belonged to the late firm, and what debts due to said firm remained uncollected; that the goods of said firm, so far as they could be ascertained, with the uncollected debts due to the firm, might be set apart and appropriated to the payment of the partnership debts of said Sprague & McGown, and the balance to the individual debts of Sprague. On the filing of this bill, which was verified by affidavit, an attachment, or writ of seizure, was ordered to issue. The writ was issued on said 1st day of October, 1850, and was levied by the sheriff on the same day, and at the same time with the writ of attachment at the suit of Read & Co. By a subsequent order of the chancellor, the goods were sold as perishable property, the outstanding notes and accounts were collected, and the proceeds brought into court. At the July term, 1852, the chancellor dismissed McGown's bill, for want of equity; but, at the June term of the supreme court, 1853, his decree was reversed, and the cause remanded.—See the case reported in 23 Ala. 524.

On the 11th July, 1854, Read & Co. filed their bill or petition in said chancery court; alleging, in addition to the facts above stated, that executions on their judgment against Sprague had been returned "no property found;" that the goods belonging to the late firm of Sprague & McGown could not be identified and separated from the goods belonging to Sprague individually; that the lien of their attachment was superior to that of McGown, and to the liens of the other creditors who had intervened; and praying payment of their judgment out of the fund in court.

On the final hearing of the cause, the chancellor decided, that the levy of the attachments at law gave the attaching creditors no lien; that the partnership creditors were entitled to be first paid out of the fund in court, and that the surplus should be divided *pari passu*, among all the individual creditors of Sprague, without regard to the time when their respective attachments were levied. From this decree Read & Co. prosecute the present appeal, and assign said decree as error.

ORMOND & NICOLSON, with W. R. SMITH, for appellants.  
E. W. PECK, *contra*.

A. J. WALKER, C. J.—After the issue of a valid writ of seizure from the chancery court, can an attachment, issued from, and returnable to a court of law, be levied upon the property embraced in the writ of seizure, and acquire a lien upon it? We concur with the chancellor in the decision of this question, expressed as the result of his learned and elaborate opinion, which has aided us very much in our investigations.

If property, ordered by a chancellor to be seized and taken into the custody of the court, can, after the reception of the precept by the sheriff, be subjected to the levy of process from a court of law, a conflict of authority would necessarily arise, of which there could be no reconciliation. It is an established principle with the chancery court, not to suffer its process, or the duty of an officer acting under it, to be examined by a court of law.—2 Story's Eq. Jur. § 891; 3 Wooddeson's Vin. Lec. 407. If a sheriff, having a writ issued from the chancery court, and an attachment from the circuit court, may execute them simultaneously upon the same property, it becomes unavoidable that the court of law shall pass upon the effect of the chancery process, the powers and duties of the officer under it, and the rights of the party suing it out. The exercise of such powers would necessarily be involved in the ascertainment of the officer's liability and duties, and the authority of the circuit court over the property, and the rights of the parties in the suit at law, as resulting from the attachment. If the chancellor should claim for his process a larger effect than the circuit court conceded, a conflict of jurisdiction and authority, with no umpire to adjust it, producing confusion and difficulty, bringing upon the officer of the law clashing obligations and commands of the two courts, would ensue. To avoid such consequences, the principle denying to a court of law the power of examining the process of the chancery court has been recognized and established. That principle, and the preservation of harmony between



the two jurisdictions, require a decision adverse to the right of having a levy of an attachment from a court of law upon property embraced in a writ of seizure from the chancery court, simultaneously with the execution of that writ. If the sheriff cannot make a levy of the attachment at the same time with the execution of the writ of seizure, it follows that, when he has both in his hands at the same time, he must execute the latter, and leave the former without a levy, unless he can find property not embraced in the writ of seizure.

A writ of sequestration authorizes commissioners to take possession of a defendant's property. Thus far there is a striking analogy between the writ of sequestration and the writ of seizure before us. The two differ as to the purposes of their issue, and as to the persons by whom they are to be executed. They agree in requiring the property to be taken into possession for the court, and that the property when so taken into possession is in the custody of the court. The law fixing the time for the operation and effect of the writ of sequestration, seems, therefore, applicable to the writ of seizure. The rule with regard to a writ of sequestration is, that it "binds from the time of awarding it, and not from the time of executing it, or of its being laid on by the commissioners."—*Burdett v. Rockley*, 1 Vern. 58; 2 Dan. Ch. Pl. and Pr. 1268. The rule with regard to receivers, who are appointed to take possession of property, is the same.—3 Dan. Ch. Pl. and Pr. 1983–1984; *Mann v. Penty*, 2 Sanf. Ch. 257, 272; *Edwards on Receivers*, (second ed.) 98–99; *Rutler v. Tallis*, 5 Sanf. Sup. Ct. R. 610; *West v. Fraser*, *ib.* 653. The analogy drawn from the appointment of receivers, however, is not so clear and complete, because the appointment operates a transfer of the property.

This case does not require us to go so far as the authorities in reference to writs of sequestration would lead us, and to hold that the writ of seizure was operative from the time it was awarded. We meet the question belonging to the case by deciding, that it had a controlling operation from the time of its reception by the sheriff; and we limit our decision to the precise case presented,

leaving the question of the earlier operation of the writ for consideration when it arises.

Another argument in support of our conclusion is afforded by the doctrine of the chancery court, that it will not permit any interference with property in its custody without its consent.—*Wiswall v. Sampson*, 14 How. 52, 65; *Nooe v. Gibson*, 7 Paige, 513; *Hackley v. Swigert*, 5 B. Mon. 86; *Kane v. Pilcher*, 7 B. Mon. 651. Even the pre-existing lien of a judgment on real estate cannot, it is said, be enforced after it has passed into the control of the chancery court, without its consent.—*Wiswall v. Sampson*, *supra*. The remedy of all persons whose rights are injuriously affected, according to the last authority cited, is to apply to the chancery court for a remedy, or for permission to proceed at law.

Now, the writ of seizure from the chancery court required the sheriff to take the property into his possession. The moment he did so, the property was in the custody of the law. His act of taking into possession placed the property in the custody of the court. The act which in its performance places the property in the custody of the chancellor, cannot also destroy or prevent that custody, so far as the levy of an attachment is concerned. He cannot qualify and restrict the custody which he takes for the court, with the levy of the attachment, unless he had the property under his control; and the moment he acquired that control, it was in the custody of the court. The correctness of the court's action, in taking possession of the individual effects of Sprague, acquired after the dissolution of his partnership with McGown, is not before us. The court took the property under its jurisdiction, and has by its orders and decrees exercised authority over it; and its acts in those particulars are conclusive upon the parties, except upon a direct appeal.

The pleadings in this case treat the writ of seizure as a valid process issued by the chancellor, and it is our duty so to regard it. We do not look behind the pleadings, to inquire into the regularity of the issue of the process.

The decree of the court below is affirmed.

## DAVIS vs. FORSHEE.

[ACTION ON OPEN ACCOUNT—ARBITRATION AND AWARD.]

1. *Voluntary nonsuit on award.*—When a pending suit has been submitted to arbitration, and an award has been rendered by the arbitrators, conforming substantially with the provisions of the Code, (§§ 2709-21,) the plaintiff cannot prevent the award from being entered up as the judgment of the court by taking a voluntary nonsuit.
2. *Competency of arbitrators.*—There is no prohibition, statutory or otherwise, in this State, against a person who is related to either of the parties to a pending suit within the fourth degree of consanguinity or affinity acting as arbitrator between them; and the fact that, by the terms of the submission, the arbitrators are to be chosen by the clerk of the court, does not affect the principle.
3. *Validity of award.*—An award, rendered under a submission to arbitration of the matters in controversy in a pending suit, cannot be set aside on account of the relationship of one of the arbitrators to one of the parties, nor because the arbitrators allowed an illegal rate of interest in the computation of accounts.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Underhill E. Davis, against Joseph Forshee. The complaint contained all the common money counts, the amount claimed by the plaintiff being \$1300. The defendant pleaded *non assumpsit*, payment and set-off. At the spring term, 1858, the matters in controversy were submitted to arbitration; the entry on the minutes of the court being as follows: "By consent of the parties, this cause is submitted to arbitration; E. H. Muse, the clerk of the court, to select the arbitrators, five in number; the reference to be had at this place, and the award of the arbitrators to be made the judgment of the court in this cause at next term; and cause continued." The award of the arbitrators was filed in the clerk's office on the 4th June, 1858, and was in these words: "We," [naming the arbitrators,] "to whom were submitted the matters in controversy existing between Underhill E. Davis and Joseph Forshee, after



having been duly sworn according to law, and having heard the proofs and allegations of the parties, and having examined the matters in controversy to us submitted, do make the following award: We find in favor of the defendant, and award to him the sum of \$411 91; and we further award, that each party pay his own witnesses, and that each party pay one-half of the fees of the referees. Given under our hands and seals, this 4th June, 1858." At the fall term, 1858, the defendant moved to have this award entered up as the judgment of the court. To this the plaintiff objected, and asked leave to take a nonsuit; having filed three pleas to the award, alleging that it ought not to be entered up as the judgment of the court, because (1st) one of the arbitrators was related to the defendant within the fourth degree of consanguinity, and because (2dly) the arbitrators, in making their award, had calculated interest against him at the rate of sixteen per cent. *per annum*. The court sustained a demurrer to the pleas, refused to let the plaintiff take a nonsuit, and entered judgment on the award for the defendant; to which rulings of the court the plaintiff excepted, and which he now assigns as error.

BROCK & BARNES, for appellant.

RICHARDS & FALKNER, *contra*.

STONE, J.—While a suit, in its ordinary form, is pending in the circuit court, the plaintiff may, at any time before verdict rendered, submit to a voluntary nonsuit. When, however, the parties to a suit refer the settlement of the controversy to arbitrators, and such arbitrators make and return to the court their award, in conformity with the provisions of the Code, (pages 494–5,) a different rule prevails. An award made under these circumstances, if it comply substantially with the provisions of the statute, "must be entered up as the judgment of the proper court." A plaintiff, in such case, is not authorized to take a nonsuit.

[2.] Although section 560 of the Code declares, that "no judge, chancellor, county commissioner or justice of

the peace, must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity;" we have no statute which declares any such disability in the matter of arbitration. A material reason on which the rule stated above rests, does not apply to arbitrators. Parties may be drawn against their consent before judges, chancellors, county commissioners and justices of the peace; and usually they have little or no choice in the matter. These are officers appointed by the law, and suitors must submit to their orders. Arbitration, in this State, is never compulsory. Parties voluntarily elect this mode of adjustment, and appoint their own arbitrators. We know no reason why persons related to suitors within the fourth degree, may not, if chosen, act as arbitrators, and make a binding award. *Volenti non fit injuria.*

The fact that in this case the arbitrators were named and chosen by the clerk of the court, cannot alter the principle. This power was expressly conferred on him by the terms of the submission; he acted as the agreed agent of both of the parties; and we must presume, in the absence of evidence to the contrary, that the persons selected were satisfactory to the parties litigant. The maxim applies, *qui facit per alium, facit per se.*

In the two points we have been considering, we think it would lead to monstrous results, if parties could submit their controversies to arbitration—speculate on the chances of success, and, after ascertaining that the award was adverse to their wishes, then relieve themselves of its consequences, by either suffering a nonsuit, or raising the objection that one of the arbitrators who sat in the cause was related to the adverse party within the fourth degree of consanguinity or affinity.—See *Heydenfeldt v. Towns*, 27 Ala. 423.

[3.] Section 2721 of the Code declares, that awards, made substantially in compliance with the provisions of the statute, are final, *unless the arbitrators are guilty of fraud, partiality or corruption in making it.* The objections urged why the award in this case should not be made the judgment of the court, did not impute *fraud, corruption*

or *partiality* to the arbitrators; and those objections were rightly overruled.—King v. Jemison, at the present term, (33 Ala. Rep. 499.)

The judgment of the circuit court is affirmed.

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### HUDGINS *vs.* GLASS.

[ACTION FOR FRAUD ON EXCHANGE OF MULES.]

1. *Estrays*.—Under the provisions of the Code, (§§ 1062–91,) the taker-up of an estray may place the animal in the possession of another person, to be kept for him; and the escape of the animal before the expiration of twelve months does not affect the title which the law confers on the taker-up at the expiration of that period.

APPEAL from the Circuit Court of Bibb.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by James Hudgins, against William M. Glass, to recover damages for an alleged fraud or deceit perpetrated by the defendant in an exchange of mules between him and the plaintiff. The fraud was alleged to consist in the fact, that the defendant, at the time of the exchange, had no title to the mule which he traded to the plaintiff, and well knew that fact at the time the contract was made. No pleas appear in the record. The bill of exceptions is as follows:

“On the trial of this cause, the following facts appeared in evidence: The plaintiff authorized one J. J. Tune to swap off a mule which he owned, and to continue swapping until he made better or worse for plaintiff. Tune swapped off plaintiff's said mule, and, before returning home, met with defendant, who bantered him for a swap. Tune and defendant swapped even. Defendant did not say whether the mule which he traded off belonged to him, or to some other person. Tune took the mule to plaintiff, and explained to him the swap which he had made. Plaintiff received the mule from Tune, and



afterwards traded it to one Johnson; and the mule finally came into the hands of one Thompson. Said Tune further testified, that afterwards, to-wit, in the summer of 1857, he saw the same mule which he had obtained from the defendant in the possession of one Josiah Sanders; and that the plaintiff's said mule, traded by him to defendant as aforesaid, was worth \$65 or \$70 at the time of the trade. Said Sanders, being then called as a witness for plaintiff, testified, that he had claimed and obtained said mule from Thompson; that said mule had been taken up and strayed by one Booker Brown in said county, about the 1st September, 1855; that said Brown, in the spring of 1856, saying that he had no corn to feed said mule, proposed that witness should take and keep her until the expiration of the twelve months, and then return her to him,—stating at the time that the mule was an estray, and that he intended to hold on to her until some one having a better claim should call for her; that witness agreed to this proposition, took said mule home with him, and kept her until some two or three weeks before the expiration of the twelve months, when she escaped from him; that after the expiration of said twelve months, being unable to find her, he paid said Brown \$70 as damages for her, with about \$20 costs, besides losing his own time and expenses while hunting her; that he found her, in the spring of 1857, in the possession of said Thompson, laid claim to her, and obtained her. The trade between Tune and defendant was made in February, 1857. After said mule had been recovered by Sanders, the trade between plaintiff and said Johnson was canceled, and plaintiff returned to him the horse which he had obtained in exchange for said mule.

“The above being the substance of all the evidence in the cause, the court charged the jury as follows:

“1. That if they believed from the evidence that Booker Brown had taken up and strayed the mule which plaintiff, through Tune as his agent, had obtained in exchange from defendant; and that Brown had delivered said mule to Sanders, to take care of; and that she had

escaped from Sanders two or three weeks before the expiration of the twelve months from the time she was strayed; and that said Sanders, after the expiration of said twelve months, and before February, 1857, paid said Brown for said mule; and that defendant was found in possession of said mule in February, 1857, and traded her to plaintiff,—then the plaintiff cannot recover in this action.'

"2. That if they believed all the evidence in the case, the plaintiff is not entitled to recover.'

"The plaintiff excepted to these charges, and then requested the court to instruct the jury, 'that if they believed from the evidence that Booker Brown was in possession of said mule before defendant obtained possession of her, and that said defendant was afterwards found in possession of her, and that defendant had not shown any claim of title to her, then, in presumption of law, said Brown's title to said mule would be superior to that of defendant.' This charge the court gave, but with the following addition, or qualification: 'that if the jury believed that said Brown claimed the mule as an estray, and not otherwise, and that she escaped before the expiration of the twelve months from the time she was strayed, and fell into the defendant's possession, then, in presumption of law, the title of said Brown was not superior to that of defendant;' to which qualification of the charge asked the plaintiff excepted.

"The plaintiff also asked the court to charge the jury, 'that if they found from the evidence that Brown had taken the mule into his possession, and had strayed her, and, while in possession, had said that she was an estray, and that he would hold her until some one having a better claim should call for her, then the jury might consider this claim, thus set up, as a circumstance tending to show that said Brown claimed her by virtue of his possession.' This charge the court also gave, but with the following addition, or qualification: 'that if they believed that Brown only claimed his possession of said mule under the estray law, then his possession gave him no title or claim superior to that of the defendant, if the

mule escaped from Sanders, to whose care the defendant had committed her, before the expiration of twelve months from the time said Brown had strayed her;' to which qualification of the charge asked the plaintiff also excepted."

In consequence of the rulings of the court above stated, the plaintiff was compelled to take a nonsuit, which he now moves to set aside; assigning as error all the rulings of the court to which he reserved exceptions.

I. W. GARROTT, for appellant.

JOHN F. VARY, *contra*.

A. J. WALKER, C. J.—The statutes found in the Code, from section 1062 to section 1091 inclusive, constitute the taker-up of an estray, who does the acts prescribed in those statutes, the bailee of the animal for twelve months, unless it is claimed by the owner; and vests him with the owner's title after twelve months. He is a law-appointed bailee, and is invested with a qualified property in the animal which is the subject of the bailment, and might, by virtue of that qualified property, maintain an action for the recovery of such animal. If the animal should escape from him during the bailment for twelve months, he might pursue and recapture it, or recover it from the person into whose possession it might happen to pass. The fact that the property escaped from the possession of the "*taker-up*," a few weeks before the expiration of the twelve months necessary to vest him with a title, would not prevent the forfeiture of the former owner's title to him. The taker-up is responsible to the owner for the negligent escape of the animal; and, even though the escape may have resulted from negligence, the rights of the taker-up as a bailee during the twelve months, and to a title after the expiration of the twelve months, would not be lost in consequence of such escape.

The forfeiture of the owner's title to the taker-up does not depend upon the fact, that the possession of the latter is continuous and without any interruption during the twelve months. If it did, the escape of the animal three



days (or even one day) before the end of the twelve months, would defeat the bailee's title; and the taker-up might be held responsible for the value of the property to the owner, without any right of recapture.

It may be that the taker-up might so act in reference to an escaped animal, that his conduct would evidence an abandonment of his right as a statutory bailee; and that the making of the report specified in section 1077 of the Code, would be conclusive evidence of such abandonment. But we need not go into this question of abandonment in this case, as the evidence does not show any facts which could be deemed an abandonment of the right of the taker-up, either as a bailee, or to the title of the property after the expiration of twelve months. The failure to recapture property before the expiration of the statutory period of bailment, which had escaped only two or three weeks before, would not terminate the bailment, nor prevent the title of the owner from vesting in the taker-up.

It would work no forfeiture of the right of the taker-up, if he employed another to keep the estray for him.

The foregoing views of the law are irreconcilable with the charges given, and the refusal of the charges asked; and therefore the judgment of the court below is reversed, and the cause remanded.

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## WARE vs. BREWER.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Amendment of judgment nunc pro tunc pending appeal.*—When a judgment is amended *nunc pro tunc*, after an appeal has been sued out, but before the transcript has been returned to the appellate court, the amended judgment may be incorporated by the clerk in the transcript without a *certiorari*; and if the only error assigned is the rendition of judgment without proof of service, and the amended judgment shows that an acknowledgment of service was proved, the judgment will be affirmed.

APPEAL from the Circuit Court of Shelby.

The record does not show who was the presiding judge.

THIS action was brought by Henry Brewer, against Horace Ware. Service of the summons and complaint was accepted by the defendant. At the March term, 1858, judgment by default was rendered against the defendant; but the judgment did not show that any proof of the acknowledgment of service was made. From this judgment, on the 30th July, 1858, the defendant sued out the present appeal. At the September term, 1858, on motion of the plaintiff, the court allowed the acceptance of service to be proved, and amended the former judgment *nunc pro tunc*, as of the preceding March term, so as to make it show the acceptance of service; and this amended judgment was incorporated by the clerk in the transcript returned to this court. The only error assigned is, the rendition of judgment against the defendant without proof of service.

BYRD & MORGAN, for appellant.

JAMES B. MARTIN, *contra*.

STONE, J.—It is contended for appellant, that the amended judgment of the circuit court should not be regarded as a part of the records in this court, because those amendments were made after the appeals were taken; and those amended judgments have not been brought to this court, in return to a writ of *certiorari*. Before the transcripts for this court were made out, the amendments had been made in the court below. Hence, when the clerk came to prepare the transcripts, those judgments were a part of the record. He copied them as parts of the record. They are now before us, taking effect as of a time anterior to the appeal; and there remains no object to be accomplished by a *certiorari*. *Wilson v. Farmer*, at the present term.

Regarding the amended judgments as part and parcel of the records, these cases must be affirmed on the authority of *Moore v. Horn & Bouldin*, 5 Ala. 234.

## LAMKIN vs. DUDLEY.

[MOTION TO DISMISS APPEAL FOR WANT OF PROPER PARTIES.]

1. *Amendment of clerical misprision in description of parties.*—In an action brought by a feme sole, whose marriage is suggested pending the suit, (Code, § 2150.) the insertion of her former name in the marginal statement of the parties in the judgment entry, being an error apparent on the record, and amendable by the record, (Code, §§ 2402, 2404) will be regarded by the appellate court as amended.
2. *Parties to appeal.*—In an action brought by a feme sole, judgment being rendered against her after her marriage has been suggested and entered of record, an appeal, sued out in her former name, will be dismissed on motion, although she is described by that name in the marginal statement of the parties prefixed to the judgment entry.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was commenced in the name of Mary D. Lamkin, whose marriage with Franklin R. Witter, pending the suit, was suggested at the term at which the trial was had. In consequence of the rulings of the court during the trial, the plaintiff was compelled to take a nonsuit, with a bill of exceptions. In the marginal statement of the parties' names, prefixed to the judgment entry, the plaintiff is described as Mary D. Lamkin; and in the appeal bond she is described by the same name. On these facts, the appellee's counsel submitted a motion to dismiss the appeal.

WATTS, JUDGE & JACKSON, with D. W. BAINE, for motion.  
THOMAS WILLIAMS, *contra*.

A. J. WALKER, C. J.—Section 2150 of the Code directs, that suits brought by or against an unmarried woman shall not abate by her marriage, but that, the marriage being suggested, suit shall proceed in her name acquired by the marriage, and that judgment should be rendered accordingly. The marriage of the plaintiff was



suggested, agreeably to the above-named section; and thereupon the suit should have proceeded, and did proceed, in her name acquired by the marriage, and judgment should have been rendered accordingly against her in her matrimonial name. There was, therefore, a clerical mistake of her name in the judgment entry. She was then known upon the record by the name acquired by the marriage, and by that name she should have been designated as a party in the judgment. This error as to the name of the party in the margin of the judgment, being apparent upon the record, and being amendable by the record, must be regarded as amended.—Code, §§ 2402, 2404: *Patterson v. Burnett*, 6 Ala. 844; *Kennedy & Merritt v. Young*, 25 Ala. 563; *Thompson v. Pierce*, 3 St. 427; *Smith v. Branch Bank at Mobile*, 5 Ala. 26. It results, that the judgment of the court below must be treated as being against the appellant in her matrimonial name. The name by which she was known before her marriage, ceased to describe any party to the suit, after the proper suggestion of her marriage; and the appeal is not taken in the name of a party to the suit. It must, therefore, be dismissed.

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## DUNCAN vs. RICHARDSON.

[ACTION ON OPEN ACCOUNT.]

1. *Waiver of security for costs.*—In an action brought by a non-resident, and commenced in a justice's court, if the defendant appears before the justice, and engages in a trial on the merits, he cannot, after the cause has been removed by the plaintiff to the circuit court, move to dismiss it for want of security for the costs.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. WILLIAM S. MUDD.

E. W. PECK, for the appellant.

S. F. HALE, *contra*.

STONE, J.—The defendant engaged in the trial of this case before the justice of the peace, and succeeded in establishing a defense on the merits. After the case was carried by appeal to the circuit court, he moved to dismiss the suit, because no security for costs had been given by the plaintiff; he being a non-resident when the suit was commenced. The defendant had waived his right to make the motion.—Weeks v. Napier, at present term; Thompson v. Clopton, 31 Ala. 647.

Judgment affirmed.

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### SANFORD *vs.* OGDEN, FERGUSON & CO.

[BILL IN EQUITY FOR EXECUTION OF TRUST DEED, REMOVAL OF CLOUD ON TITLE, AND INJUNCTION OF ACTION AT LAW.]

1. *Conflicting liens of judgment and mortgage*.—A stay of execution on a judgment, by order of the plaintiff, is constructively fraudulent as against a *bona fide* creditor, who, during the suspension, acquires a mortgage or deed of trust on the debtor's lands, to secure an antecedent debt; and the lien of the judgment, in such case, will be postponed to the mortgage or deed of trust. (Overruling *Doe d. Leverich v. Bates*, 6 Ala. 480.)

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

ON the 25th March, 1841, Ogden, Ferguson & Co. obtained a judgment, in the county court of Mobile, against Thaddeus Sanford, for \$5,846 69, besides costs. This judgment belonged in fact to J. & C. Townsend, of New York, who had endorsed for collection to Ogden, Ferguson & Co. the note on which it was founded; on which note Thaddeus Sanford was an accommodation endorser for John W. Townsend; another judgment being

recovered about the same time, and on the same note, against said J. W. Townsend. On this judgment against Sanford the following executions were issued: 1st, *fi. fa.* issued April 17, 1841, returned on 6th May, 1841, "by order of plaintiffs' attorney," as having been issued by mistake; 2d, *alias fi. fa.* issued May 18, 1842, returned, on 10th June, 1842, "stayed by order of plaintiffs;" 3d, *pluries fi. fa.* issued on the 27th June, 1842, and returned, on same day, "all proceedings stayed by order of plaintiffs' attorney;" 4th, *alias pluries fi. fa.* issued 19th June, 1843, and levied on 9th September following on certain lands, which were sold, on the first Monday in November following, to Walter F. Townsend, for \$1,676 61, after deducting costs and commissions; 5th, another *alias pluries*, issued on 3d April, 1844, and returned, on 31st May following, by order of plaintiffs' attorney; 6th, another *alias pluries*, issued on 1st June, 1844, and returned, on 7th February, 1845, "no property found;" 7th, another *alias pluries*, issued on 2d October, 1846, and levied on certain other lands, which were sold, on the first Monday in November following, to Walter F. Townsend, for \$158 75, exclusive of costs and commissions; 8th, another *alias pluries*, issued on the 1st April, 1853, and levied on certain other lands, but not in time to sell; and, 9th, another *alias pluries*, issued on the 27th May, 1853, and enjoined by the bill filed in this case. In addition to the credits to which the judgment was entitled, arising from the sales of land as above stated, the following payments were credited on it, as voluntary payments: \$565, paid on 7th January, 1842; \$630, paid on 3d June, 1842; and \$500, paid on 31st May, 1841.

On the 10th February, 1843, Thaddeus Sanford executed a deed, by which he conveyed all the lands on which the executions above-named were levied, with others, to Charles B. Sanford as trustee, to secure James Sanford against liability as accommodation endorser for him on certain notes, and also to secure other creditors. This deed was duly recorded, and was accepted by the beneficiaries. On the 4th June, 1853, James and Charles B. Sanford, in behalf of themselves and the other benefi-



ciaries under this deed, filed their bill in equity against all the parties claiming an interest in the lands under judgments at law against Thaddeus Sanford; alleging, that they had paid the notes secured by the deed; that said Sanford was insolvent, and had no other property than the lands conveyed by the deed; that Walter F. Townsend, the purchaser of the lands at sheriff's sale, had conveyed a portion of his interest therein to one William A. Dawson; that both Townsend and Dawson had instituted actions at law for the recovery of the lands; that these actions, and the claims set up by Townsend and Dawson, constituted a cloud on the title of the lands, which would prevent them from bringing their full value at the trustee's sale; and that the complainants' title, under their deed of trust, was superior to any claim founded on the judgment at law, in consequence of the stay of execution by order of the plaintiffs in the judgment. The prayer of the bill was for an execution of the deed of trust under the directions of the court, an injunction of the actions at law and of the execution then in the sheriff's hands, an account, &c.

Dawson was the only defendant who filed an answer to the bill; but, by written agreement of counsel, his answer was allowed to stand as an answer for the other defendants. He alleged, that W. F. Townsend and himself owned the entire interest in the judgment recovered by Ogden, Ferguson & Co against Thad. Sanford; insisted, that their lien under the judgment was superior to that of the complainants, and was not at all affected or impaired by their failure to coerce its immediate satisfaction; and he appended to his answer, as exhibits, copies of the letters from J. & C. Townsend, under which the several executions were stayed. These letters were written from New York city, and were addressed to Ogden, Ferguson & Co.; their respective dates and contents being as follows:

(May 6, 1841.) "A letter having been received from John W. Townsend, of Mobile, asking indulgence in the matter of a judgment obtained for us, through your house there, against the property of the said John W. Townsend and Thaddeus Sanford; you will be kind enough to

instruct your house at Mobile to grant them an indulgence, under the following circumstances: If, in the opinion of their lawyers, our security under the judgment will be in no wise impaired by letting it lie, and the parties will pay all costs, expenses, fees and commissions, and five hundred dollars in cash, in New York funds, by the 1st June ensuing, towards the liquidation of the debt; and, as an earnest of their intention, will give security to pay five hundred dollars in the same funds, six months thereafter, viz., on 1st December, 1841, then let such judgment lie until May, 1842, unless necessary for our security to be realized sooner."

(Dec. 22, 1841.) "Not having heard from your house in Mobile, in relation to a payment of five hundred dollars due from John Townsend and Thaddeus Sanford, of that place, on the 1st inst., you will be kind enough to instruct that house that, if said amount of \$500 was not paid, according to agreement, on the 1st inst., and has not been paid since that time, then they will, without further delay, proceed to execution on judgment [against] said John W. Townsend and Thaddeus Sanford."

(April 4, 1842.) "You will be kind enough to instruct your house at Mobile, that if, on the 1st May ensuing, John Townsend and Thaddeus Sanford do not pay the remaining sum, with interest, then due, (say \$5,250,) then they will immediately proceed to execution on judgment, to the full amount of balance due, with interest. Of course, the amount to be paid will be in specie, or its equivalent, which, when paid, you will be kind enough to have remitted in some safe manner."

(April 13, 1842.) "You will be kind enough to instruct your house in Mobile, that, since our letter of the 4th inst., we have received one from John W. Townsend, of that place, again asking for further indulgence by staying execution of judgment, without naming any definite time when the debt should be voluntarily paid, or explaining how far his property would be sacrificed by collecting the same by virtue of an execution. He says, that, already, more than the whole amount of the judgment has been sacrificed, in raising the \$1000 paid last year. Can this

be? These are times, undoubtedly, difficult to raise money; and we cannot, at this distance, well judge how far leniency should be exercised, and must, therefore, leave it to your discretion, to be guided only in this way: If you find, on inquiry, that the sacrifice in immediate execution will be of a very ruinous or disastrous character, causing a greater loss than would probably be sustained by a similar proceeding nine months hence, then let the judgment lie for the present; *provided*, the security for the eventual payment is ample, and will be in no way lessened by the delay. But, if you find, on inquiry, such apprehension of loss to be exaggerated, and that, in your opinion, nothing will be gained by delay, then proceed with the execution according to our letter of the 4th inst. Perhaps, should you think it best to delay execution, you may be able to get (say) \$1,000 on account. But, whatever steps you take, be kind enough to write immediately the course adopted. We are desirous not to postpone the collection of this debt, unless its collection is to be attended with serious sacrifices to John W. Townsend; for we believe the year's profits of the office of postmaster at Mobile are sufficient to satisfy the judgment, without any sacrifice of property."

(April 29, 1842.) "We have received a letter from John W. Townsend, of Mobile, under date of 19th inst., which, for the first time, satisfies us that to pay the whole amount of our claim at present would cause him ruinous sacrifices. He proposes, in the same communication, to pay us five hundred dollars, (which must be in silver, or equal to it,) every six months, until the whole claim is liquidated, and as much sooner as he can. We have, therefore, to trespass again on your kindness, in requesting through you that your house in Mobile will postpone execution on judgment, and accept the terms here proposed, of five hundred dollars every six months; always retaining, of course, security for the eventual payment of the full judgment. Should John Townsend represent it as too difficult to raise the first installment of five hundred dollars at this time, your house will then postpone its collection for the present."



By agreement of counsel, at the hearing, it was admitted, that these letters truly stated the facts relative to the indulgence granted on the judgment; also, that the complainants' deed of trust was made in good faith, and was duly recorded; that the debts secured by it were genuine, and were paid by James Sanford before the filing of the bill; that the sales under the judgment took place as above stated; and that W. F. Townsend became the purchaser at the sheriff's sale, and afterwards conveyed a portion of the property, for valuable consideration, to said W. A. Dawson.

On final hearing, on pleadings and proof, the chancellor held, that the defendants, Townsend and Dawson, under their purchases at the sheriff's sale, were entitled to priority over the complainants; and he rendered a decree accordingly, which the complainants now assign as error.

R. H. SMITH, and THOS. H. HERNDON, for appellants.

P. HAMILTON, *contra*.

A. J. WALKER, C. J.—The returns upon the executions issued upon the defendants' judgment, the letter of the owners of the judgment, of 29th April, 1842, the payments of \$565 on 7th Jan., '42, and \$630 on 3d June, '42, and the agreement of counsel, upon which the case was tried, all considered together, lead us to the conclusion, that there was a stay of execution, resulting from the active interference of the parties having a right to control the judgment, from the 27th June, 1841, to 19th June, 1843. On the 10th February, 1843, during the suspension of proceedings under the judgment, the complainants' deed of trust was made.

The mere failure on the part of a judgment creditor to prosecute his remedies for the collection of his judgment will not affect his lien.—Turner v. Lawrence, 11 Ala. 427; DeVendell v. Hamilton, 27 Ala. 171; Dargan v. Waring, 11 Ala. 988; Sellers & Cook v. Hays, 17 Ala. 749. But, in the case of Patton v. Hayter, Johnson & Co., 15 Ala. 18, it was decided, that the lien of a judgment creditor,

who directed his execution to be held up, would be postponed to a junior creditor, whose execution was levied while the senior creditor's execution was held up under such order.—See, also, *McMahan v. Green*, 12 Ala. 71-74; *Br. B'k at Montgomery v. Broughton & Duprey*, 15 Ala. 132; *Leach v. Williams*, 8 Ala. 764; *Wood v. Gary*, 5 Ala. 152; *Br. B'k v. Robinson*, 5 Ala. 628; *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711. The same principle has been applied in favor of a mortgagee, who came in during a suspension of proceedings under the judgment, and whose mortgage was executed upon a valuable consideration passing at the time.—*Albertson, Douglass & Co. v. Goldsby*, *supra*.

It is supposed that the same principle cannot apply to this case. But why not? The ground upon which the cases proceed is, that the interference to prevent the collection of the judgment by the plaintiff is constructively fraudulent, and destroys the lien, *quoad* other creditors, whose executions are levied during the operation of such interference. If the interference is constructively fraudulent, why shall it open a door for judgment creditors alone to come in? Why should that differ from all other frauds, in vitiating only as to judgment creditors? Why may not a creditor, not having a judgment, come in and acquire a lien by contract, as a creditor having a judgment may acquire a lien by virtue of his judgment, or by levy of process? We can see no grounds for a discrimination against any creditor who comes in during the constructively fraudulent suspension of proceedings under the judgment, and acquires a lien by mortgage or deed of trust; and if he is a creditor, it cannot injuriously affect him that the mortgage is given to secure antecedent debts. It is his character of creditor which clothes him with the right to claim advantage of the fraud.

We cannot reconcile the judgment rendered in *Doe, ex dem. Leverich v. Bates*, 6 Ala. 480, with our conclusion; nor can we reconcile it with the later case of *Patton v. Hayter, Johnson & Co.*, *supra*, which had relation to a lien on land. The decision seems to have been made without noticing or advertng to the principle

settled in Patton v. Hayter, Johnson & Co., and cannot be permitted to weigh as an authority adverse to a principle which was manifestly not thought of when it was made. The only question which is considered in the case of Leverich v. Bates, is as to the effect of an *agreement*, without consideration, to stay execution. With all that is said we entirely concur, and nothing in this opinion is at war with it. The decision in that case was not designed to touch the question now in hand. So far as it may have affected the question by inference from the judgment rendered, it is at war with the later case in 15 Ala.; and to that we prefer to adhere, rather than to the adjudication upon the point inferred from the judgment rendered in Leverich v. Bates.

The decree of the court below is reversed, and the cause remanded, to be proceeded with in pursuance of the foregoing opinion.

## DAVIDSON & BRADY vs. STREET & FERGUSON.

[ACTION FOR USE AND OCCUPATION OF LAND.]

1. *Conflict between judgment entry and bill of exceptions.*—Where there is a conflict between the judgment entry and the bill of exceptions, the latter must control the former.
2. *Service of writ on partners.*—Where the summons describes the two defendants as late partners, but the complaint contains no such description or averment; and the summons is executed on but one of them, who alone appears and pleads, the rendition of judgment against both is unauthorized.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

JOHN T. MORGAN, for appellant.

WM. M. BYRD, *contra*.

STONE, J.—The complaint in this case describes an account due from “W. Fayette Davidson and Jules



Brady," without styling them as partners. The summons describes them as "W. Fayette Davidson and Jules Brady, late partners under the firm name of Davidson & Brady." The sheriff returned the summons executed on Brady, and Davidson not found. The bill of exceptions, which must control the judgment entry, (see *Vincent v. Rodgers*, 30 Ala. 471,) recites that Davidson did not appear. Brady alone pleaded. Under this state of facts, the court was not authorized to render judgment against Davidson.—Code, § 2142; *Childress v. Taylor*, at June term, 1858, (33 Ala. 185.)

It is not likely that the other questions will be again presented before us, in the form in which they appear in this record. Hence we forbear an expression of opinion on them.

Judgment of the circuit court reversed, and cause remanded.

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### CAMP vs. SIMON.

#### [BILL IN EQUITY FOR REDEMPTION OF LAND.]

1. *To whom tender must be made.*—Where the purchaser at execution sale has sold and conveyed the land to another person, who is in open possession under his purchase, a tender can only be made to the latter.
2. *Weight of responsive answer.*—The testimony of two witnesses, or of one witness with corroborating circumstances, is necessary to overcome the denials of a sworn answer, which is responsive to the allegations of the bill.
3. *What constitutes tender.*—A mere proposition to pay is not, of itself, a valid tender: there must be an actual production of the money, or something to excuse the failure to produce it.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 28th May, 1851, by Eugene Simon, against N. S. Graham and Edward Camp; and sought to redeem a certain tract of land,

which had been sold under execution against said Simon on the 21st May, 1849, and purchased at the sale by said Graham, who, before the filing of the bill, had sold and conveyed to his co-defendant, Camp, who was in possession when the bill was filed. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, which the defendants now assign as error.

JOHN T. MORGAN, for the appellants.

ELMORE & YANCEY, *contra*.

A. J. WALKER, C. J.—The purchaser at execution sale, “on receiving the sheriff’s deed, becomes the absolute owner.” “Nothing is left in the former owner, or his judgment creditors, but the naked right to redeem.” *Spoor v. Philips*, 27 Ala. Rep. 193; *Kannon v. Pillow*, 7 Humph. 281–293. The title, subject only to the right to redeem, vested in the purchaser at execution sale, is assignable. He may transfer by deed his title, as he may the title to other land. After a conveyance by the purchaser at execution sale, all his right is vested in his grantee; and an application to redeem must be made to the grantee. The redemption statute contemplates a payment or tender, after a conveyance by the purchaser at execution sale, to the grantee “claiming under such purchaser;” certainly where the grantee has gone into possession after his purchase.—*Clay’s Digest*, 502, § 1.

Graham, the purchaser at the execution sale, had, before the tender alleged in the bill, parted by a conveyance with all his right, and vested it in Camp, who had gone into open and known possession. It was requisite, therefore, that the tender should be made to Camp; and neither a tender to Graham, nor a waiver of a tender by him, after his conveyance, could vest the equitable right, the existence of which is requisite to the maintenance of the bill.—*Spoor v. Philips*, 27 Ala. 193.

[2.] The right to a decree in favor of the complainants cannot exist, unless there was a tender to Camp. Camp denies, in response to the allegation of the bill, that any tender was made to him. This denial is made in sworn

answers; and the bill was filed in 1851, before the adoption of the Code. It was requisite, therefore, that the complainants should overcome the denial of the answer, by the testimony of two witnesses, or of one witness fortified by corroborating circumstances. The allegation of the bill is supported by the testimony of one witness, who deposes that a tender was made by a sub agent of Simon. But that testimony is not corroborated by any circumstances, or supported by any other witness. On the contrary, the credibility of the witness is somewhat impaired by the fact, that there is an inconsistency between his testimony and that of another witness, as to the offer of money to the defendant Graham.

[3.] The answer of Camp admits, that an agent of the judgment debtor came to him, and told him that he was authorized to make a tender. This admission of the answer would not be sufficient to establish a tender, even if it had gone farther, and admitted that the witness said he was ready to make the tender. A mere proposition to pay is, of itself, insufficient. There must be an actual production of the money, or there must be something to excuse the failure to produce it.—*McGehee v. Gewin*, 25 Ala. 176; 9 Bacon's Abridgment 313, 314, Tender, (B.) 1.

On account of the want of sufficient proof of tender, the court below erred in not dismissing the complainant's bill; and its decree must be here reversed, and a decree must be rendered, dismissing the complainant's original and amended bills at their costs, and the appellees must pay the costs of this court.



RIGBY *vs.* NORWOOD. •

## [ACTION ON GUARANTY OF PROMISSORY NOTE.]

1. *Guaranty of note held within statute of frauds.*—A guaranty endorsed on a promissory note, then past due, in these words, “I guaranty the payment of the within note by the 1st January, 1857,” dated October 1st, 1853, is a “promise to answer for the debt, default, or miscarriage of another,” within the meaning of section 1551 of the Code.
2. *General charge on evidence.*—Where the written contract declared on, and offered in evidence by the plaintiff, is void on its face under the statute of frauds, the court may instruct the jury, without hypothesis, to find for the defendant.
3. *Requisitions of statute of frauds as to written contracts.*—A contract within the statute of frauds, (Code, § 1551,) to be valid, must not only be in writing, subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing, but must also express the consideration: section 2278, which makes written contracts, when the foundation of the suit, presumptive evidence of a consideration, does not apply to contracts within section 1551.
4. *Sufficiency of complaint on contract within statute of frauds.*—In declaring on a contract within the statute of frauds, it is not necessary that the complaint should show a compliance with the requisitions of the statute.
5. *Presumption of injury from error.*—Where the complaint contains a count on a guaranty of a promissory note, a count on a promise to pay in consideration of forbearance granted to another, and a count on an account; and a demurrer is erroneously sustained to the first count,—the appellate court will presume injury from the error, and will reverse and remand at the instance of the plaintiff, although the written guaranty offered in evidence by him, under the other counts, is void on its face under the statute of frauds.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

The complaint in this case was as follows:

“Elijah Rigby                      The plaintiff claims of the defend-  
     *vs.*                                      ant the sum of \$2,397 40, due by  
 John A. Norwood.              him on the 1st January, 1857, by his  
     guaranty, dated 1st October, 1853, of a promissory note  
     for the sum of \$1,806 81, made by James C. Norwood on  
     the 7th March, 1850, and due one day after the date  
     thereof, (with a credit on said note of \$300 on the 2d

December, 1850, with interest thereon from said 1st January, 1857.

“And said plaintiff complains of said defendant, and claims of him the further sum of \$2,397 40, with the interest due thereon, for that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, one Jas. C. Norwood was indebted to the said plaintiff in a certain sum of money, to-wit, the sum of \$1,806 81, with the interest due thereon; and thereupon, heretofore, to-wit, on the first day of October, 1853, at, &c., in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defendant, would forbear and give time to the said James C. Norwood for the payment of the said sum of money, with the interest due thereon, until the 1st January, 1857, he, the said defendant, undertook and then and there faithfully promised to pay him, the said plaintiff, the said sum of \$1,806 81, with the interest due thereon. And said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, so made as aforesaid, did forbear and give time to the said James C. Norwood for the payment of the said sum of \$1,806 81, with the interest due thereon, until the said first day of January, 1857, to-wit, at &c.; whereof the said defendant afterwards, to-wit, on the day and year last aforesaid, then and there had notice; and thereby, according to the tenor and effect of his said promise and undertaking, he, the said defendant, became liable to pay to the said plaintiff the said sum of \$1,806 81, with the interest due thereon, on said first day of January, 1857, at to-wit, &c. And said plaintiff avers, that said last mentioned sum of money, with the interest due thereon, is now due and unpaid.

“And said plaintiff claims of said defendant the further sum of \$2,397, due from him by account on the first day of January, 1857; which sum of money, with the interest due thereon, is now due.”

The court sustained a demurrer to the first count—on what ground, the record nowhere shows. The defendant

pleaded, "in short by consent, 1st, the general issue; 2d, want of consideration, to the second count; and, 3d, the statute of frauds;" and on these pleas issue was joined.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence a promissory note for \$1,806 81, executed by James C. Norwood, dated Mobile, March 7, 1850, and payable, one day after date, to Elijah Rigby or bearer; also, a written endorsement thereon, signed by the defendant, dated October 1, 1853, in the following words: "I guaranty the payment of the within note by the 1st January, 1857." "The plaintiff having closed, the defendant introduced one Berry as a witness, who testified, that he heard the plaintiff say, in the fall of 1853, that the defendant had not received a dollar for his guaranty of James C. Norwood's note—that it was put on the back of the note to prevent it from running out of date, and that he did not think he would make the defendant pay anything, or hold him liable on it. After said Berry had given his evidence, the plaintiff moved the court to exclude it from the jury; which motion the court overruled, and the plaintiff excepted. To show a benefit to the guarantor, the plaintiff proved that, in 1848, the defendant had in his possession a slave named Boykin, the property of said James C. Norwood, (as said James C. said in the presence of said defendant, who did not deny it;) that said Jas. C. was a citizen of California; and that said slave, within the last month, had been seen by him in Cahaba, Dallas county. The court excluded this evidence from the jury, on the defendant's motion, and the plaintiff excepted."

"This being all the evidence in the cause, the court charged the jury, at the defendant's request, 'that if they believed the evidence, they must find for the defendant.' To this charge, also, the plaintiff excepted."

The errors now assigned are, the sustaining of the demurrer to the first count of the complaint, the rulings of the court on the evidence, and the instructions to the jury.



GEO. W. GAYLE, and D. W. BAINE, for appellant.

BYRD & MORGAN, and ALEX. WHITE, *contra*.

STONE, J.—The obligation of the defendant, which was read in evidence in this case, was a “promise to answer for the debt, default or miscarriage of another,” within section 1551 of the Code, which declares such agreement void, “unless the agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.”—*Brown v. Adams*, 1 Stew. 51; *Browne on the Statute of Frauds*, §§ 158, 159, 160; *Fay v. Hall*, 25 Ala. 704; *Shepherd's Digest*, 640. In the present case, the agreement is *in writing, signed by the party to be charged therewith*; but the agreement or memorandum does not *express the consideration*, and hence the statute pronounces it void.

[2.] It necessarily results from what we have said, that the plaintiff cannot recover on the written guaranty or endorsement of the defendant, because that guaranty does not express any consideration. It is thus shown that the circuit court did not err, either in the exclusion of evidence, or in the charge to the jury. The evidence offered was irrelevant and immaterial, because the contract, being void on its face, could derive no aid from the testimony offered. There was no evidence before the jury of any liability on the part of the defendant, and the court could have so instructed them, without invading any province of theirs. The testimony was in writing. It consisted of the written contract, which was void on its face. In such case, a charge directly on the evidence, without referring its credibility to the jury, is permissible. *Knox v. Fair*, 17 Ala. 503.

[3.] The English statute of frauds, 29th Charles II, in relation to contracts to answer for the debt, default, &c., of another, required the “*agreement upon which the action is brought, or some memorandum or note thereof, to be in writing.*” In the case of *Wain v. Warlters*, 5 East, 10, it was ruled, that the word *agreement* was more

comprehensive than the words *promise* or *undertaking*; and that it signified "a mutual contract on consideration between two or more parties." It was further held, that the consideration, as well as the promise, should be set down in the writing, and that parol evidence could not be received to supply it.—See, also, *Rann v. Hughes*, note in 7 T. R. 350; *Saunders v. Wakefield*, 4 Barn & Ald. 593, (6 Eng. Com. Law. 531;) *Morley v. Boothby*, 3 Bing. 107, (11 Eng. Com. Law, 53.)

Our own statute of 1803 (Clay's Digest, 254, § 1) employs the words "*promise* to answer for the debt, default or miscarriage of another person," and does not expressly require the consideration to be expressed in the writing. Under this statute, our predecessors held, that neither the pleadings nor the evidence need affirmatively show that such promise was made or given upon a consideration: that under our statute of 1811, (Clay's Dig. 340, § 152,) the promise imported a consideration, until the presumption was rebutted—See *Thompson v. Hall*, 16 Ala. 204, and authorities therein cited.

It will be observed, that the distinction between the English statute and our act of 1803 consists in the substitution by our legislature of the word *promise*, for *agreement* employed in theirs. The case of *Wain v. Warlters*, *supra*, was made by Lord Ellenborough to hinge on the word *agreement*. See, also, *Violett v. Patton*, 5 Cranch, 142, (2 Cond. Rep. Sup. Ct. 214;) and authorities collected in *Thompson v. Hall*, *supra*.

The guaranty declared on in this case was executed after the Code went into operation, January 17, 1853; and it is contended for appellant, that inasmuch as the contract which is the foundation of the suit is in writing, and purports to be executed by the party sought to be charged, it is evidence of the existence of the debt, and that it was made on sufficient consideration.—Code, § 2278. Such is doubtless the general rule on the subject; and if there be nothing on the face of this contract to take this case out of the operation of the general rule, then, in pronouncing on the effect of the evidence, we must concede to the appellant the benefit of

this rule. This argument cannot be supported, without a practical abrogation of the statute of frauds. Section 2278 cannot apply to contracts which are covered by section 1551, so as to relieve such contracts from the necessity of expressing the consideration.

[4.] The first count of the complaint in this case sets forth a good and valid cause of action, unless the provisions of the Code require the consideration to be averred. The guaranty described is as complete as that which in *Donley v. Camp*, 22 Ala. 659, was pronounced a binding guaranty of the payment of the note at maturity. The authorities are uniform, that contracts within the statute of frauds need not be averred to be in writing. The question arises on the proof.—See authorities *supra*; *Robinson's Adm'rs v. Tipton's Adm'r*, 31 Ala. 595; and 1 *Chitty's Pl.* 303. The same rule was held to apply to *agreements* to answer for the debt, default or miscarriage of another, which, under the rule, were required to be in writing, expressing the consideration. Under these principles, we feel bound to declare the first count in the complaint good.

[5.] It may be that the plaintiff has not been injured by the action of the court in sustaining a demurrer to the first count in his complaint. If the evidence he gave on the former trial be the only claim he has against the defendant, he certainly has not been, as he manifestly never can recover on that contract. We do not, however, feel authorized to assume that each count was for one and the same cause of action. We have been referred to no case which authorizes us to apply the doctrine of error without injury to such a case, and we are unwilling to establish such a precedent. It might, in some cases, work the greatest hardship.

For the error in sustaining the defendant's demurrer to the first count of the complaint, the judgment of the circuit court is reversed, and the cause remanded.



## CAPELL vs. LANDANO.

[BILL IN EQUITY FOR SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Conclusiveness and effect as evidence of interlocutory probate decree* —In a proceeding before the probate court for the settlement of a guardian's accounts, the auditing and stating of the account by the judge, by which a balance is ascertained against the guardian, is but the interlocutory ascertainment of a fact preliminary to a decree, and is not evidence against the ward, in a subsequent chancery suit, when it appears that, before the rendition of a final decree, the proceeding was voluntarily dismissed at his instance.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Wesley N. Capell and Harvey S. Capell, against John Nugent, Giobe Landano, and others; and sought to compel a settlement of said Nugent's accounts as guardian of the complainants, and to enforce payment of whatever balance might be found due to them out of certain property, real and personal, in the hands of Landano, who, the bill alleged, purchased from Nugent, with notice that said property had been mortgaged by Nugent to the sureties on his official bond as complainants' guardian. A decree *pro confesso* was taken against Nugent. Landano filed an answer, insisting that he was a purchaser for valuable consideration without notice. He further alleged, that proceedings had been instituted in the probate court of Mobile, before the filing of complainants' bill, to compel a settlement of Nugent's guardianship; and that, after the court had taken jurisdiction, and had fully audited and adjudicated the accounts, showing a balance of only \$350 in favor of the complainants, they dismissed the proceeding.

A transcript from the records of the probate court of Mobile, which was made an exhibit to Landano's answer, showed the following proceedings to have been had in the matter of the settlement of Nugent's accounts and vouchers as guardian: On 3d January, 1846, Nugent filed his

accounts and vouchers for final settlement; publication was ordered, and the third Saturday in February was appointed for the settlement. On the 21st February, the 7th March, the 4th April, the 11th April, and the 2d May, successively, the proceeding was regularly continued. On the 16th May, the guardian and his wards both appeared, by attorney, "and the court proceeded to an lit and examine said accounts; and for good cause shown, it is [was] ordered, that the further hearing and consideration of the same be continued." On the 23d May, it was ordered, "that the settlement of the accounts of John Nugent, guardian of Wesley N. and Simpson Capell, minors, be continued." On the 6th June following, the following entry was made: "In the matter of the settlement of accounts of John Nugent: Considered and *credited* [audited?] in part, and cause continued." On the 13th June, the proceeding was again continued. On the 2d September following, an entry was made in these words: "The motion of said minors, by their solicitor, for a rehearing and a new trial, having been heard, it is considered by the court, that the same be refused." The other entries shown by the transcript are as follows:

"Wesley N. Capell and } Orphans' Court of Mobile  
Simpson Capell, minors. } county, April —, 1848.

This day came Wesley N. Capell and Harvey S. Capell, by their guardian, Alex. B. Capell; and the accounts of John Nugent, the late guardian of said Wesley N. and Harvey S., [having] been audited and passed upon in full at a former term of this court, and a balance of three hundred and fifty dollars having been found and adjudicated to be due from said John Nugent, late guardian, &c., unto the said minors, the same was prepared for final decree; and on the 18th April, 1848, the said minors, by their said guardian, having made application to the court for leave to dismiss the proceedings against said Nugent; when, on this day, came the said Wesley N. Capell and Harvey S. Capell, by their guardian, Alex. B. Capell, and, by permission of the court, dismiss the proceedings against said John Nugent, late guardian, &c.: It is therefore considered, that said proceedings be dismissed, and

that the said Wesley N. and Harvey S. Capell pay the costs incurred in this behalf."

"Wesley N. Capell and } For manifest errors in the  
Harvey S. Capell, minors. } order entered on the 18th  
day of April last, it is ordered, that it be amended, and  
entered *nunc pro tunc*, so as to read thus: Wesley N. Capell,  
having become of mature age, in his own proper person,  
and Harvey S. Capell, by his guardian, dismisses the  
proceedings, &c., to-wit:

"Wesley N. Capell } Orphans' Court of Mobile  
and Harvey S. Capell. } county, April 18, 1848.

In this cause, the court having, on a former day, audited and prepared for final settlement the accounts of said John Nugent, whereby there was ascertained by the court to be due from the said Nugent to the said Wesley N. and Harvey S. Capell the sum of three hundred and fifty dollars; now, this day, came Wesley N. Capell in his own proper person, and shows to the court that he came of age on the 22d February last, and objects, so far as he is concerned, to any further action of this court in the settlement of the accounts between his late guardian, Alex. B. Capell, and his former guardian, John Nugent, and, with the leave of the court, dismisses said proceedings; and came also, at the same time, by his attorney, the said Alex. B. Capell, as guardian of the said Harvey S. Capell, and, on behalf of his said ward, dismisses said proceedings against said Nugent."

The cause having been submitted for a decree on the merits, the chancellor held the complainants entitled to the relief sought by their bill, and ordered a reference to the master of the matters of account. In the statement of the guardian's accounts before the master, the defendant Landano produced a certified transcript of the proceedings had in the probate or orphans' court of Mobile, "and insisted that these proceedings created a *prima-facie* case of the state of accounts between said complainants and said Nugent up to that time." This transcript, in addition to the orders above mentioned, contained a copy of an account-current between said Nugent and his wards,



which was certified (and admitted) to be in the handwriting of the then judge of the orphans' court. The balance ascertained against the guardian by the statement of the accounts therein contained was \$357 99; and appended to the statement were certain "notes," also in the handwriting of the judge, giving his reasons for allowing some items and rejecting others. In stating the account, the master refused to give any effect to these proceedings in the orphans' court, and reported a balance against Nugent of over \$50,000. The defendant Landano excepted to the master's report, on account of the refusal to treat the proceedings in the probate court as showing a *prima-facie* case of the state of the guardian's accounts; and the exception was sustained by the chancellor, who rendered a decree in favor of the complainants for \$694, as the amount due to them from their guardian, (that being the balance ascertained against the guardian by the account as stated by the orphans' court, with interest thereon up to the date of the decree,) and ordered a sale of the property in Landano's possession.

From this decree the complainants appeal, and here assign as error the sustaining of the defendant's exception to the master's report, and the final decree rendered.

GEO. N. STEWART, and D. W. BAINE, for appellants.

R. H. SMITH, and THOS. H. HERNDON, *contra*.

A. J. WALKER, C. J.—The proceedings in the orphans' court, for the final settlement of the guardian's accounts, was continuous from its commencement to its dismissal. It was not a proceeding of separate and distinct parts, each complete in itself, but one in which every step, from its commencement, tended to the result of a final settlement by a final decree. Until its termination by some final decree, it was incomplete: it remained *sub judice*; the jurisdiction of the court over it continued, and the court retained jurisdiction over the question of its dismissal. A dismissal of the proceeding before its termination, and while it still remained under the jurisdiction of the court, prevented any of the orders or ascertain-

ments previously made from having any effect as evidence. *McLane v. Spence*, 11 Ala. 172. If a court never proceeds further than to ascertain some interlocutory matter, which is merely preliminary to the decree, such ascertainment cannot be evidence; because it was not conclusive, but subject to be vacated or altered by the court, at any time before the rendition of its decree.—*Baugh v. Baugh*, 4 Bibb, 556; *Thompson v. Peebles*, 6 Dana, 387; *Davis v. Roberts*, 1 S. & M.'s Ch. R. 543; *Dabbs v. Dabbs*, 27 Ala. 647; *Rhodes v. Turner*, 21 Ala. 217; *Willis v. Willis*, 16 Ala. 652; *Ashley v. Ashley*, 15 Ala. 15.

If it be conceded that the orphans' court, in virtue of an appearance by an attorney, had jurisdiction of the persons of the infants, (as to which, see *Riddle v. Hanna*, 25 Ala. 484; *Cook v. Adams*, 27 Ala. 294; *Clack v. Clack*, 20 Ala. 461; *Smith v. Smith*, 21 Ala. 761; *Preston v. Dunn*, 25 Ala. 507;) and if it be further conceded that the settlement of the account, with the judge's subjoined notes, was truly and properly a part of the record, (as to which, see *Shadden v. Sterling*, 23 Ala. 518; *Hall v. Hudson*, 20 Ala. 284; *Hudson v. Hudson*, 20 Ala. 364;) it is nevertheless clear, that the auditing of the account, and its statement by the judge, accompanied as they are by no judgment of the court, were but the interlocutory ascertainment of a fact preliminary to a decree, and (the proceeding having been afterwards dismissed) are not evidence against any person of a judicial decree.

The chancellor erred, therefore, in treating the account stated by the judge of the orphans' court as the measure of the complainants' recovery. The decree of the court below is reversed, and the cause remanded.

## STETSON vs. LYONS.

[ACTION ON COMMON MONEY COUNTS.]

1. *Sufficiency of commissioner's certificate to deposition.*—When the certificate of the commissioner, appended to a deposition, (Code, §§ 2322-23,) states that the testimony of the witness was taken down under oath, and subscribed by the witness, in his presence, at the time and place named; and that he has personal knowledge of the witness,—this is a substantial compliance with the provisions of the statute.
2. *Production of papers on notice.*—Under a notice to plaintiff to produce “the books and papers in his possession containing all the business transactions had between him and the defendant relative to the subject-matter of the suit,” certain books, papers and letters having been produced, “all which were subject to the inspection and use of the defendant, and witnesses were examined as to some of said books as evidence,”—the defendant is not entitled to read one of the letters in evidence, without proof of handwriting.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. NAT. COOK.

THIS action was brought by N. S. Stetson, against Sophia Lyons, to recover a balance of \$496, due by account on the 1st January, 1857; and was commenced by attachment. The defendant pleaded the general issue, payment, and the statutes of limitations of three and six years. The plaintiff joined issue on the first and second pleas, and replied specially to the others; averring, that the account concerned the trade of merchandize between merchant and merchant, and that the defendant was non-resident; and issue was joined on the replications. Before entering on the trial, as the bill of exceptions shows, the plaintiff moved the court to suppress the deposition of one Joseph E. Caro, which had been taken on interrogatories, “on account of the insufficiency of the commissioner's certificate, thereto appended.” The said certificate was in these words: “I, the commissioner in said commission named, do hereby certify, that the evidence of the witness, Joseph E. Caro, was taken down under oath, and subscribed by him in my presence, on the 8th



April, 1857, at Pensacola, Florida; and that I have personal knowledge of said witness. Witness my hand and seal," &c. The court overruled the motion, and the plaintiff excepted.

"Afterwards, during the trial, the plaintiff produced and proved accounts and dealings between him and the defendant, commencing in August, 1845, and running to 2d March, 1847; at which last date there remained a balance due to plaintiff of \$297 21. Having first proved notice to the plaintiff to produce the books and papers in his possession containing all the business transactions hitherto had between him and defendant relative to the subject-matter of the suit, and also of all subsequent dealings between them, the defendant now called for the production of said books and papers; and the plaintiff's books, as called for, were produced, from the sales and cash-book to the ledger, inclusive, together with certain letters, which purported to be from the defendant to the plaintiff, in reply to letters from him to her; all which were subject to the inspection and use of the defendant, and witnesses were examined as to some of said books as evidence. To show payment of said balance in full, the defendant offered in evidence the deposition of said Caro, above referred to; and, to rebut the evidence of payment, the plaintiff proved that, after, as well as before the date of the last item of said account, he had written to defendant at Pensacola, for money due him; and a letter in the handwriting of said Caro, but purporting to be signed by the defendant, with its enclosure, was read. The plaintiff read in evidence, also, the defendant's affidavit attached to Caro's deposition, and offered to read in evidence the letters purporting to be written by defendant, in reply to letters written by plaintiff to her, and particularly one bearing date July 14, 1847, which acknowledged an indebtedness, and promised to pay soon; said letters being thereupon referred to, as produced on notice. The defendant objected to the reading of said letters, or any of them, on the ground that there was no proof of defendant's handwriting, or that she authorized said letters to be written. The court sustained the objection, and

excluded said letters; to which ruling of the court the plaintiff excepted."

The two rulings of the court above stated, to which exceptions were reserved, are now assigned as error.

K. B. SEWALL, for appellant.

OVERALL & MOULTON, *contra*.

STONE, J.—[1.] No specific objection to the certificate of the commissioner, who certified the deposition of the witness Caro, has been pointed out to us. We think the certificate sufficient, and hold that the circuit court rightly overruled the motion to suppress.—King v. King, 28 Ala. 315; Thrasher v. Ingram, 32 Ala. 645.

[2.] The rule invoked by appellant, in its largest application, goes only to this extent: When a paper is produced under notice, and is *examined* by the party who called for its production, this *examination* constitutes the paper evidence for the party producing it, if he elect to make such use of it.

The notice in this case does not specify or describe any letter or letters. It called, in general terms, for the production of "the books and papers in plaintiff's possession, containing all of the business transactions had hitherto between plaintiff and defendant in relation to the subject-matter of this suit, and also of subsequent dealings between them." The bill of exceptions does not inform us that the letters were inspected. True, speaking of the books and papers, it says, "all which were subject to the inspection and use of the defendant, and witnesses were examined as to some of said books as evidence." The meaning of this language, as we understand it, is, not that all the books and papers were examined, but that defendant was offered the opportunity of making an examination, if she had chosen to embrace it. Some of the *books* she must have inspected, because witnesses were examined in relation to them. It is not affirmed that she examined any of the letters. The court did not err in rejecting the letters offered in evidence.—1 Greenleaf's

Ev. § 563; Phil. Ev. (edition by Van Cott,) part 2d of notes, 426-27, 409.

In thus laying down the rule, we do not wish to be understood as deciding or affirming, that all papers which a party may produce, under a general notice calling for all papers upon a particular subject, are made evidence, simply by an inspection of them, and this, irrespective of their genuineness. Under such a rule, a spurious paper might be, by a corrupt party, substituted for the genuine one called for; and thus the practice of calling for the production of papers, would be rendered extremely hazardous. Moreover, it did not appear to the circuit court, nor, are we informed, that the papers offered in evidence were genuine, or were called for by the notice. We simply state this proposition, without intending, at this time, to decide it.

Judgment of the circuit court affirmed.

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## JEMISON vs. WOODRUFF & BEACH.

[ACTION AGAINST PURCHASER FOR PRICE OF MACHINERY SOLD AND DELIVERED.]

1. *When contract of sale is complete.*—Upon the delivery to the purchaser of an article manufactured for him, and its acceptance by him, (if not sooner,) the contract of sale is complete, and the title to the article vests in the purchaser.
2. *Rescission of contract by purchaser.*—After a contract of sale is complete, and the title to the article sold has vested in the purchaser, he cannot rescind or annul the contract, on account of the vendor's breach of warranty or fraudulent misrepresentations as to the quality of the article, without placing or offering to place the vendor *in statu quo*.
3. *How far fraud and breach of warranty constitute defense to action for purchase-money.*—In an action against the purchaser, to recover the price agreed to be paid for an article sold and delivered to him, he cannot, while he retains the article, and has not offered to rescind the contract, avoid the payment of the entire purchase-money, on the ground of fraud or breach of warranty, unless the article is altogether valueless.



APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Woodruff & Beach, as partners, against Robert Jemison, jr., to recover the price agreed to be paid for two steam-engines manufactured by the plaintiffs, under a contract with the defendant, and delivered to him. The complaint contained all the common counts, and a count on a bill of exchange; the bill having been given by the defendant, on the delivery of the engines, in part payment of the price of the engines. The defendant pleaded *non assumpsit*, payment, and, as to the bill of exchange, failure of consideration. On the trial, as appears from the bill of exceptions, the plaintiff proved the contract under which the engines were manufactured for the defendant, their delivery to, and acceptance by him; that he paid a part of the purchase-money soon after the delivery, and gave the bill of exchange sued on for the residue; and that he had frequently promised to pay the amount due on the bill, after making certain deductions which he claimed on account of defects in some of the machinery. The plaintiffs lived in Hartford, Connecticut. The contract for the manufacture of the steam-engines was made with the defendant through Messrs. Leach & Avery, who acted as plaintiffs' agents at Tuskaloosa; and the engines were to be delivered to the defendant at that place, to be used in his steam saw-mill. "It was a part of the original understanding of the parties, that if any part of either of the engines proved defective, it was to be supplied by plaintiffs." It was proved, on the part of the defendant, that the engines did not correspond in all respects with the stipulations of the contract; that he pointed out the defects to Messrs. Leach & Avery when the engines were received, and was assured by them that said defects did not affect the quality or working capacity of the engines; that the cylinder of one of the engines failed within a few days after it had been put up, and was thereupon sent back to the plaintiffs, in order that a new one might be made; that the plaintiffs, up to the time of the trial, had failed to make a new cylinder for

him; and that the engine to which this cylinder belonged, in the opinion of defendant's witness, "was of no use to him, but rather an expense—that, without a new cylinder, it was of no more value than so much old iron; but, with a new cylinder, would be a good and suitable engine." The defendant retained the possession of the engines, and it was not shown that he had ever offered to return them to the plaintiffs.

"The defendant insisted, by his counsel, that the plaintiffs' contract to make and deliver the two engines, was an entire contract, and bound them to deliver both engines well made, and suitable and fit for use, before the defendant was liable and bound to pay for them in the manner stipulated in the contract; and that if the jury believed from the evidence that they were not both so made and delivered before the commencement of the suit, the plaintiffs ought not, in this action, to recover for either engine; and asked the court so to instruct the jury; but the court refused so to instruct the jury, and the defendant excepted."

"The defendant then insisted, that if said contract, under the evidence in the cause, might be considered as a divisible, and not as an entire contract; then, if the jury believed from the evidence that one of said engines, at the time of delivery, was defectively made, and, by reason of such defective making, was not fit for use, and so remained until the time when this suit was brought, the plaintiffs ought not to recover any part of the price of said engine in this action; and asked the court so to instruct the jury; which charge the court refused to give, and the defendant excepted."

The refusal of the charges asked is the only matter now assigned as error.

E. W. PECK, for the appellant.

J. H. FITTS, *contra*.

A. J. WALKER, C. J.—The appellant contracted with the appellees for the manufacture of two steam-engines, to be delivered to him in the city of Tuskaloosa. They

were delivered, and accepted and put in operation by the appellant, who paid a part of the purchase-money, and gave a bill of exchange for a part. It is sought by this suit to recover the unpaid purchase-money. Certainly, upon the delivery to the appellant, and acceptance by him, (it not sooner,) the sale was complete, and the title to the engines vested in the purchaser.—Chitty on Con. 336; Addison on Contracts, 222, 243; White v. Adkins, 18 Ala. 636.

The want of correspondence of the purchased articles with a warranty, express or implied, and the fraudulent misrepresentation of the qualities of the articles, would not prevent the title from vesting in the purchaser by virtue of the contract of purchase, the delivery, the acceptance, and the payment and security of the purchase-money. The sale of the engines being complete, the purchaser could not, without the consent of the seller, annul or rescind the contract, unless he placed, or offered to place the seller in *statu quo*. To the rescission of the contract, a return or offer to return the property was necessary.—Pharr v. Bachelor, 3 Ala. 237; Borum v. Garland, 9 Ala. 452; Barnett v. Stanton, 2 Ala. 181; Dill v. Camp, 22 Ala. 249; S. C., 27 Ala. 553; Addison on Contracts, 273. There was, in this case, no return, or offer to return the defective engine. There was, therefore, no rescission, and no legal right to treat the contract as rescinded or annulled.

Unless there was a rescission of the sale, or unless the article purchased was valueless, the purchaser could not resist the payment of the entire purchase-money of the defective article. His defense, while he retains the article purchased, extends only to an abatement of the price agreed to be paid. To entitle the purchaser to avoid the payment of the purchase-money entirely, upon the ground of fraud or breach of warranty, when he holds on to the property, it is not sufficient that it is valueless for the particular purpose for which it was bought—it must be intrinsically of no value.—Davis v. Dickey, 23 Ala. 848; Burton v. Stewart, 3 Wendell, 236; see, also, the authorities cited above; Addison on Contracts, 273.



The charges asked would have allowed a defense as to the entire purchase-money of an article, the sale of which was complete and unrescinded, notwithstanding the article was of value, and was retained by the purchaser. In the refusal of those charges there was no error.

The judgment of the court below is affirmed.

### MOORE vs. APPLETON.

[ACTION BY AGENT AGAINST PRINCIPAL ON IMPLIED PROMISE OF INDEMNITY.]

1. *Execution of bill of exceptions.*—In an action which was pending when the Code went into effect, and which is consequently (§ 12) not governed by its provisions, the bill of exceptions must be under the seal of the presiding judge.
2. *Averment of breach in complaint.*—In an action by an agent against his principal, on an implied promise of indemnity against losses sustained in the execution of the agency, *held*, on the authority of the former decision in the same case, (*Moore v. Appleton*, 26 Ala. 633,) that an allegation in the complaint, that said defendant had notice of the losses and damages sustained by the plaintiff, set forth in the declaration, and failed to pay the same, was a sufficient averment of a breach.
3. *Sufficiency of plea denying notice.*—A plea averring that “plaintiff did not, before the institution of this suit, notify defendant,” &c., does not negative notice to the defendant.
4. *Conclusiveness of judgment.*—A judgment recovered against principal and agent, by the owner of certain personal property, which the agent had tortiously taken under a contract with his principal, is conclusive on the principal, as to the title to the property, in a subsequent action brought against him by the agent on an implied promise of indemnity against damages in the execution of the agency.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. SYD. MOORE.

THIS action was brought by Claiborne G. Appleton, against John Moore, “to recover damages sustained by plaintiff, growing out of certain acts performed by him, in the capacity of agent for the defendant, in the year 1846, in dispossessing and removing one Aaron B. Quinby

from a certain tract of land, lying in said county of Lawrence, and known as the place on which said defendant now keeps a toll-gate," &c.; and was commenced on 9th September, 1852. The original declaration contained two counts, each of which was held defective on error. See the case reported in 26 Ala. 633. After the remandment of the cause, the plaintiff filed an amended second count, in the following words :

"And whereas, also, the said defendant, heretofore," &c., in 1846, "constituted and appointed said plaintiff his agent, generally and specially to do and perform all such acts and things as he might request said plaintiff to do during the year 1846; and afterwards," &c., "while plaintiff was acting in the capacity of agent for defendant, and, as such agent, and at the defendant's special instance, request and direction, plaintiff purchased from one Aaron B. Quinby certain goods and chattels," (describing them;) "and afterwards said defendant ratified the said purchase, and he and plaintiff, at said defendant's request, proceeded to, and did take possession of said goods and chattels; and plaintiff avers that, at the time said goods and chattels were so purchased and taken, he did not know that the same was a trespass or tort, but acted in good faith as defendant's agent, and upon the faith of his representations and assurances that said purchase and taking was lawful and proper. And whereas, afterwards, on the 3rd March, 1847, one Aaron B. Quinby instituted suit against said plaintiff, in the circuit court of said county, claiming damages for the taking away of said goods and chattels, and afterwards died, and said suit was thereupon revived in the name of his administrator, who, on," &c., "recovered judgment for a large sum, to-wit, the sum of \$200, besides costs; all of which was collected from plaintiff, by the proper officer of said county, under execution issued on said judgment; and, in addition thereto, said plaintiff was compelled to pay out large sums of money to his attorneys, to defend him, and divers other expenses incident to said litigation, to-wit, the sum of \$200. And plaintiff avers, that said defendant had due notice of the rendition of said judgment, and the collection thereof

from plaintiff, and that said judgment and payment were on account of said taking, and of all the other losses and damages sustained by plaintiff, as above set forth, and failed and refused to pay the same, or any part thereof; by means whereof, plaintiff has been injured," &c.

To this count the defendant demurred, but his demurrer was overruled; and he then pleaded—1st, the general issue; 2d, "that plaintiff did not, before the institution of this suit, notify defendant that he (plaintiff) had been compelled, by legal process or otherwise, to satisfy any part of the judgment recovered by said Quinby against him, nor did he ever demand of said defendant, before the institution of this suit, the amount which he now says he has paid;" 3rd, "that the goods and chattels in plaintiff's declaration mentioned, at the time when the same were taken in possession by plaintiff, were the property of this defendant." The court sustained a demurrer to the second and third pleas. On the trial, a bill of exceptions was reserved by the defendant, which, under the decision of this court, requires no particular notice.

The errors assigned are, the overruling of the demurrer to the amended complaint, the sustaining of the demurrers to the second and third pleas, and the rulings of the court to which exceptions were reserved.

D. P. LEWIS, for appellant.

R. W. WALKER, *contra*.

STONE, J.—This suit was commenced before the Code went into operation; and hence, the execution and legality of the bill of exceptions must be tested by the statute, as it is found in Clay's Digest, p. 307, § 5. The paper found in this record, which is relied on as a bill of exceptions, has neither a seal nor scroll; and, under our former decisions, we cannot regard anything it contains.—Floyd v. Fountain, 17 Ala. 700; Godden v. LeGrand, 28 Ala. 158.

This reduces our investigations to very narrow limits.

[2.] The 2d count in the amended declaration strictly



conforms to the decision of this court, pronounced when the case was before us at a previous term.—*Moore v. Appleton*, 26 Ala. 633. We there said, “An averment that the principal had notice of the losses and damages sustained by the agent set forth in the declaration, and failed to pay the same, would be a good breach in such a case as this.” This declaration contains that averment.

[3.] The 2d plea is defective in this, that while it fails to negative *notice* to the defendant, its object and aim are to cast on the plaintiff the new and additional burden of proving that he *himself* had given notice of the recovery and payment, or had demanded payment of the money before he instituted his suit. This is a palpable attempt to depart from our former decision, and, under our rules, cannot be tolerated.—*Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136, and authorities cited.

[4.] The third plea is defective, and the demurrer to it was rightly sustained.

We have now disposed of all the questions which the state of the record authorizes us to consider.

Judgment of the circuit court affirmed.

R. W. WALKER, J., having been of counsel, not sitting.

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### GREENWOOD vs. COLEMAN.

[BILL IN EQUITY TO ENFORCE VOLUNTARY CONVEYANCE.]

1. *Validity of fraudulent deed as between parties.*—A voluntary conveyance, made with intent to hinder and defraud the grantor's creditors, is nevertheless valid and binding as between the parties; and the grantor cannot set up the fraud in avoidance of it.
2. *Construction of deed of gift.*—A deed of gift, by which certain slaves are conveyed to a trustee, in trust for the grantor's wife during the term of her natural life, “and at her death to descend to her children, if any should survive her; and in case there be no child or children, then said property, or such portion as may be undisposed of, to descend to, and be a part of the estate of the said” grantor,—creates a life estate in the wife, with remainder to her children living at her death.

3. *Continuance of trustee's title.*—Where slaves are conveyed by deed to a trustee, in trust for the grantor's wife for life, with remainder to her children living at her death, and, in default of children, then to descend and revert to the grantor, the title of the trustee ceases on the death of the wife, and the children then living take a legal estate.
4. *Statute of limitation as applicable to infant remainder-man.*—The statute of limitations is no defense to a bill filed by a remainder-man, against the grantor in a voluntary conveyance, seeking a recovery of the slaves conveyed, together with an account of their hire and profits, when it appears that the grantor set up no adverse possession during the life of the first taker, that the remainder-man was an infant when his right accrued, and that the bill was filed within three years (Code, § 2486) after he had attained his majority.
5. *Conveyance of wife's separate estate under act of 1850.*—If a married woman, while yet an infant, joins with her husband in a conveyance of her separate statutory estate under the act of 1850, (Session Acts 1849-50, p. 63,) the deed is voidable as to her; and a bill in equity, filed within a reasonable time after attaining her majority, is an appropriate mode of availing it.
6. *Allowance to father out of child's estate for education and maintenance.*—Under a bill filed by a child against her father, to enforce the execution of a voluntary conveyance of slaves, with an account of their hire and profits,—held, on the authority of *Alston v. Alston*, (ante, p. 15,) that a reference to the master should have been ordered, to ascertain whether the defendant was able to maintain and educate the complainant in a manner suitable to her independent fortune; and that, if he was unable so to maintain and educate her, an allowance should be made to him for that purpose out of her income.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 2d January, 1856, by Mrs. Lucy J. Coleman, a married woman, suing by her next friend, against Samuel Greenwood, her father, and others. Its object was, to enforce a partition of certain slaves between the complainant and her only sister, Leonora Greenwood, and to compel the said Sam'l Greenwood to account for the hire and profits of said slaves, which were in his possession. The complainant's title to the slaves was founded on a deed of gift, dated the 13th June, 1840,\* by which the said Samuel Greenwood, in consideration of natural love and affection for his wife, Mrs. Elizabeth R. R. Greenwood, conveyed them to his son, Wm. Greenwood, as trustee, "in trust for the said Elizabeth R. R. Greenwood during the term of her natural life, and at her death to descend to her children, if any should survive her; and in case there be no child or chil-

dren, then the said property, or such portion as may be undisposed of, to descend to, and be a part of the estate of the said Samuel Greenwood." The bill alleged, that this deed was acknowledged by the grantor before a justice of the peace, was duly recorded, and was accepted by the trustee; that Mrs. Greenwood, the complainant's mother, died in 1843, leaving the complainant and said Leonora her only surviving children; that the complainant married her present husband, George W. Coleman, in 1849, being then in her seventeenth year; that the trustee named in the deed removed from the State, and died in 1854; that the slaves conveyed by the deed remained in the possession of the grantor, and some of them were sold and disposed of by him; that in March, 1851, both the complainant and her said husband being then under the age of twenty-one years, they released to the said grantor all her interest in said slaves and their increase, in consideration that he would deliver up to them six of said slaves; that this release was given for the purpose of avoiding an unpleasant family difficulty, and is void on account of the complainant's infancy. The prayer of the bill was, that the slaves might be divided between the complainant and her said sister; that, if necessary for that purpose, a sale might be had under the direction of the court; that the release might be set aside; that said Samuel Greenwood might be compelled to account for the hire and profits of the slaves in his possession, as also for the value of those which he had sold; and for general relief.

An answer was filed by Samuel Greenwood, in which he set up the following defenses: 1st, that the deed of gift was executed for the purpose of securing his property to his wife and children against whatever judgment might be recovered against him in a slander suit then pending, and with the express understanding between the parties that it was to be void and of no effect if no judgment was rendered against him; 2d, that the deed, if valid for any purpose, conferred no interest on the complainant; 3d, that the complainant's interest in the slaves, if any she ever had, was effectually released by the instrument executed by her and her husband in 1851, her husband



being then of full age; 4th, that the statute of limitations had effected a bar to the suit; and, 5th, that on account of his inability, in the event the complainant's claim was sustained, to educate and maintain her in a manner suitable to her fortune, an allowance should be made to him, out of the amount for which he might be held accountable, for her past maintenance and education.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, which is now assigned as error.

WM. M. BYRD, and GEO. W. GAYLE, for appellant.

WM. P. & THOS. G. CHILTON, with J. T. MORGAN, *contra*.

A. J. WALKER, C. J.—The deed of Sam'l Greenwood, under which the complainant claims, was valid against him, notwithstanding it may have been made with a fraudulent intent.—Wiley, Banks & Co. v. Knight, 27 Ala. 336; Walton v. Bonham, 24 Ala. 513; Rochelle v. Harrison, 8 Porter, 351.

[2.] The decisions of this court settle the construction of the deed, and give it the effect of creating a life estate in Mrs. Greenwood, with a remainder to her children living at her death.—Elmore v. Mustin, 28 Ala. 369; McVay v. Ijams, 27 Ala. 238; Couch v. Anderson, 26 Ala. Rep. 676; McWilliams v. Ramsey, 23 Ala. 813; Williams v. Mason, 23 Ala. 488.

[3-4.] By virtue of the deed, the complainant is entitled to an undivided half of the negroes covered by it, with their subsequent increase, unless her right is barred by the statute of limitations. The statute of limitations effected no bar in the life-time of Mrs. Greenwood. Six years from the execution of the deed had not elapsed when she died; and besides, the answer sets up no adverse possession until 1843, in which year she died. Upon the death of Mrs. Greenwood, in 1843, the trust terminated, and the legal title vested in her two children, the complainant and Leonora Greenwood. The deed in this case is materially different from that which was construed in Bryan and Wife v. Weems, 29 Ala. 423.

That deed expressly continued the trust after the death of the first taker. The trustee was clothed with a trust for the remainder-men, as well as the beneficiary of the antecedent estate. Here, the trust, by the terms of the deed, does not extend beyond the death of Mrs. Greenwood. The property is conveyed to the trustee, to have and hold in trust for the use "of the said Elizabeth R. R. Greenwood during the term of her natural life, and at her death to descend to her children, if any should survive her; and in case there be no child or children, then the above property, or such portion of it as may be undisposed of, to descend to, and be a part of the estate of the said Samuel Greenwood." It is most clear, that the words of the deed do not vest the remainder in the trustee; and there was no purpose to be accomplished by a longer continuance of the trust. For these reasons, and upon the authorities which we cite below, we decide, that the two children of Mrs. Greenwood took a legal title to the slaves, free from any trust.—*Smith v. Ruddle*, 15 Ala. 28; *Comby v. McMichael*, 19 Ala. 747. It follows, that an adverse possession after the death of Mrs. Greenwood is not available to the defendant, upon the ground that the legal title in remainder was vested in an adult trustee. The complainant having been an infant when her right accrued, the statute of limitations could not bar it, because this suit was commenced within three years after her majority.—Code, § 2486.

[5.] The act of 1850 authorizes the conveyance of a married woman's statutory separate estate, by joint deed of husband and wife. The wife's consent is requisite to the conveyance. She must be a party to the contract, and one of the makers of it. Upon universally accepted principles of law, she cannot give her consent to the contract during her infancy. If she were a feme sole, she could not make a deed which she could not avoid. It is inconceivable that it was designed to confer upon her, when under coverture, an authority to contract which did not pertain to her if sole and unmarried, and to dispense with the disability of infancy.—*Pool v. Mix*, 17 Wend. 119; *Sanford v. McLean*, 3 Paige, 117. We

decide, therefore, that the release of Mrs. Coleman and her husband, made during the infancy of the former, was voidable. The bill in this case was an appropriate mode of avoiding it; and the application is made in a reasonable time, all the circumstances of the case being considered.

[6.] In the case of *Alston v. Alston*, at the present term, we had occasion to consider the question of the allowance to a parent, out of his child's independent estate, for the maintenance and education of the child. Upon the principles settled in that case, we think the chancellor should have referred it to the register, to ascertain whether the father was able to maintain and educate his daughter, in a manner corresponding with her independent fortune; and, if he was not, should allow him to retain out of the income of such independent estate such sums as may have been expended in the bestowment of a maintenance and education corresponding with such fortune.

For the error of the decree in reference to this last particular, it is reversed, and the cause remanded.

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## WHITLEY vs. MURRAY.

[ACTION FOR RECOVERY OF OVERSEER'S WAGES.]

1. *When action for money paid lies not against principal in favor of agent.*—If an agent purchases articles at a store, on the credit of his principal, and afterwards voluntarily pays for them himself, he cannot maintain an action against his principal to recover the amount so paid.
2. *Breach of contract by employee.*—If an overseer, having contracted to serve his employer for the term of one year, and stipulated that, in the event of his failure to comply with any of the conditions of the contract, he should not recover any compensation for the services which he might have rendered, voluntarily leaves the service before the expiration of the year, he cannot recover any compensation, without proving that he was discharged by his employer, or that the employer had violated the contract on his part.



APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by William B. Whitley, against John Murray. The complaint contained three counts; the first claiming \$200, as damages for the defendant's breach of an agreement between him and the plaintiff, whereby the latter agreed to serve the defendant in the capacity of overseer on his plantation in Lowndes county, at the rate of \$400 *per annum*; and averring that the plaintiff served the defendant, under said contract, in the capacity of overseer, for more than two months, and that the defendant refused to pay, &c.; the second claiming \$200 for work and labor performed by plaintiff on defendant's plantation; and the third claiming \$100 for money paid by plaintiff, for defendant, and at defendant's instance and request. No pleas appear in the record.

On the trial, as the bill of exceptions shows, the plaintiff proved that he acted as overseer for defendant, on his plantation in Lowndes county, from the 1st January, to the 2d March, 1858; and that his services were worth \$33 per month. He also introduced a merchant as a witness, "who testified, that certain articles, consisting of paper, &c., of the value of 37½ cents, were purchased at his store by plaintiff, and charged to defendant; that he had no order from defendant to do so, further than an order from plaintiff; that a bill of said articles was made out, and the money paid to him by the plaintiff. The evidence did not show when, or for whom, said articles were used. On cross-examination of a witness introduced by defendant, plaintiff's counsel asked him, 'if he knew whether it was the defendant's custom to allow his overseer to purchase such articles as paper and stationery on his account, for the use of the plantation.' On the defendant's objection, the court refused to allow the witness to answer this question; and the plaintiff excepted."

The defendant proved, and read in evidence to the jury, the written contract between him and plaintiff, by which the latter agreed to serve him in the capacity of an overseer, from the 1st January, 1858, to the 1st January, 1859,

“for the sum of \$400 in cash, 300 lbs. of bacon, 50 lbs. of brown sugar, and 25 lbs. of coffee, under the following conditions: The said Whitley is never to leave or absent himself from said plantation on business at any time during my” (said defendant’s) “absence from the State, and only with my consent when I am on the plantation; he is never to drink ardent spirits to intoxication, while in my employ; he is not to maltreat any of my slaves, and is to give his personal attention to my business; and failing to comply fully with all or either of these conditions or stipulations, the said Whitley is to leave my employment, at my discretion, without the least remuneration for the time he may have served me.” The defendant further proved the plaintiff’s handwriting to a letter, dated February 11th, 1858, which purported to be a reply to one received from the defendant, in relation to certain charges against the plaintiff involving a violation on his part of the stipulations of the contract; and which concluded with the following words: “I will not stay any longer than this letter has time to give you word, and for you to come or send out; I will relieve you of the trouble of discharging me on the spot.” The defendant proved, also, that on his arrival from South Carolina, after the date of plaintiff’s said letter, he did not see plaintiff on his plantation, and never saw him afterwards. “The defendant, however, introduced a witness who testified, that he had a conversation with defendant on the morning after the latter’s arrival from South Carolina, in which defendant stated, that he was surprised to find plaintiff on his plantation, and that he supposed he had left; that witness told him, ‘that he had not, as he did not want to forfeit his wages;’ that defendant replied, ‘he knows what the contract is, and that he could have left without forfeiting his wages.’ Said witness having stated that one Spann was present at this conversation, defendant thereupon introduced said Spann as a witness, who stated that he had no recollection of any such conversation.”

“This being all the evidence in the case, the court charged the jury, that if they believed the whole evidence to be true, they must nevertheless find for the defendant;

to which charge the plaintiff excepted," and was thereupon compelled to take a nonsuit.

The rulings of the court on the trial, as above stated, are now assigned as error.

J. F. CLEMENTS, and W. F. WITCHER, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—If the merchant had made an effort to collect out of Mr. Murray the value of the stationery supplied to Mr. Whitley, it would have been important to prove, that he, Mr. Whitley, had authority, express or implied, to purchase such articles on the credit of Mr. Murray, his employer, and thus charge him in account with the merchant. This record presents a different question. After purchasing the articles, and having them charged to Mr. Murray, Mr. Whitley paid the account—voluntarily, so far as this record discloses; and he now seeks to recover from Mr. Murray the money so paid. This state of the facts leaves Mr. Whitley in an inextricable dilemma. If he had authority to purchase the articles on Mr. Murray's account, then his subsequent payment of the account was unauthorized—was not at the instance or request of Mr. Murray, and cannot, under the facts disclosed in this record, give him a right of action. On the other hand, if he had no authority to purchase on Mr. Murray's account, the payment by him was but a payment of his own debt, and gives him no cause of suit against his employer.—Addis. on Con. 56. It is thus shown that we need not decide, whether the testimony offered was competent proof of agency.

[2.] So far as this record discloses, Mr. Whitley voluntarily left the service of Mr. Murray. This he had no authority to do; and hence he fails to show a breach of the contract by his employer. His contract being for the entire year, and he having failed to serve the year out, he cannot, according to the terms of his contract, recover for the time he served, or for a breach of the contract, without proof that he had been discharged, or that his employer had broken his contract, and thus authorized



him to leave the service. There being an entire absence of proof of either one of these propositions, the court was fully justified in giving the charge excepted to.

There is nothing in this record which shows that the circuit court, of its own motion, gave the charge to which exception was taken.

Judgment of the circuit court affirmed.

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## TARRY vs. BROWN.

[TRESPASS FOR CARRYING OFF SLAVES.]

1. *What title will support action.*—Proof of actual possession at the time of the trespass is sufficient to sustain this action, against a mere wrongdoer who is not the real owner of the chattel.
2. *Proof of title.*—In trespass against several, any evidence which shows title in one of them, under whom the others acted, is relevant and admissible for the defendants; and any evidence which tends to disprove such title, is competent for the plaintiff in rebuttal.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. WILLIAM S. MUDD.

This action was brought by James P. Tarry, against Wilson R. Brown, Thomas D. Cole, and Reuben W. Cole, to recover damages for the defendants' tortious act in forcibly taking from the plaintiff's possession several slaves. The slaves had belonged to the plaintiff's deceased wife, Mrs. Sarah Tarry, who died in 1855, and bequeathed them to the defendants Thomas D. and Reuben W. Cole, who were her nephews; appointing their co-defendant, Wilson R. Brown, the executor of her last will and testament. No pleas appear in the record, but the defendants seem to have relied on their title under the will of Mrs. Tarry.

On the trial, the plaintiff proved his possession of the slaves on the 2d January, 1856, and that they were forci-

bly taken from him on that day by the defendants. It was shown, also, that some of the slaves were in the possession of one George W. Palmer, who was the first husband of Mrs. Sarah Tarry, and remained in his possession from the year 1826 up to the time of his death,—the others being the descendants of these; that after the death of said Palmer, the slaves remained in the possession of his widow, until her marriage, several years afterwards, with one Wade H. Watson; that they continued in the possession of said Watson and his wife, until his death in 1846; that after the death of Watson, his widow continued to hold possession of them until her marriage, in 1847, with the plaintiff; that the slaves then remained in the possession of plaintiff and his wife until the death of the latter, and that the plaintiff then retained the possession of them until they were forcibly taken from him by the defendants. After the plaintiff had closed, the defendants offered in evidence the will of said Wade H. Watson, “to show that said slaves were thereby bequeathed to his wife, the said Sarah.” The plaintiff objected to the admission of this will as evidence, on the ground that it was irrelevant, and reserved an exception to the overruling of his objection. The defendants then offered in evidence the will of Mrs. Sarah P. Tarry, the plaintiff’s deceased wife, accompanied with proof of its admission to probate, and the grant of letters testamentary to the defendant W. R. Brown. In connection with this will, the defendants introduced as a witness I. W. Garrott, Esq., the attorney by whom it was written, who testified to circumstances connected with the drafting of the will,—stating, in substance, that the plaintiff employed him to write the will, that it was written and executed in plaintiff’s presence, without objection on his part, and that, in effect, he admitted that the slaves were the separate property of his wife. “The plaintiff objected to the reading of said will of Mrs. Sarah Tarry, on the ground that it was irrelevant, and also to the testimony of said Garrott;” and reserved exceptions to the overruling of each objection.

In rebuttal of the defendants’ evidence, “the plaintiff

offered to prove, that said negroes had never been included in any inventory of the estate of said George W. Palmer, deceased, had never been sold by any representative of said estate, or as the property of said estate, and had never been administered in any manner as the property of said estate; that said Wade H. Watson was, in 1837, duly appointed and qualified as the administrator *de bonis non* of said estate; that said Watson married the widow of said Palmer in 1837, and, in 1842, resigned his said office of administrator of said estate, and made a final settlement thereof, without in any manner whatever accounting for any of said slaves." On the defendants' objection, the court excluded this evidence, and refused to admit any portion of it; to which, also, the plaintiff excepted.

In consequence of the rulings of the court on the evidence, as above stated, the plaintiff was compelled to take a nonsuit, which he now moves to set aside.

JOHN F. VARY, for appellant.

WM. E. CLAKE, *contra*.

A. J. WALKER, C. J.—“Proof of actual possession by the plaintiff, at the time of the trespass, will, in all cases, suffice to maintain this action (of trespass) against a mere wrongdoer, not being the real owner of the chattel.”—2 Saunders on Pl. & Ev. 861; Graham v. Peat, 1 East, 244; 2 Saunders' R. 47; Squire v. Hollenbeck, 9 Pick. 551.

The plaintiff was in possession of the property, the asportation of which affords the material ground of complaint in this case. If the defendants had no title, they were mere wrongdoers; and the possession is, of itself, without a title in the plaintiff, sufficient ground for the maintenance of the action. It is, therefore, a material and relevant inquiry in this case, whether the defendants, or one of them, upon whose authority the others acted, had title to the property. It was competent to show that they, or one of them under whom the others acted, had title; and it was, on the other hand, competent for the



plaintiff to show that no such title existed; for, in so doing, he shows that the defendants were mere wrongdoers, and that his possession is sufficient to sustain the action brought in the absence of any title in himself.

The will of Watson, the will of Mrs. Tarry, and the testimony of Garrott, all tended to show title to the property in the defendant Brown, as the executor of the last will and testament of Mrs. Tarry, and were, therefore, properly admitted in evidence. The objection to Garrott's testimony was general, and there was no error in overruling it, although some portions of it may have been inadmissible. We, therefore, abstain from pronouncing upon the legality of the different parts of it. It affords proof of declarations and conduct on the part of the plaintiff, conducing to show an admission and recognition by him of title in the testatrix of defendant Brown, and was certainly, thus far, admissible.

The entire evidence offered by the plaintiff, and rejected by the court, tended to show a want of title in the defendant, as the executor of Mrs. Tarry's will. It was therefore admissible, and the court erred in rejecting it. Before the offer of evidence which was rejected by the court, it had been proved, that a part of the slaves in controversy, and the maternal ancestor of the rest, were in the possession of one Palmer, a former husband of Mrs. Tarry, from 1826 to his death, in 1836. This evidence conduced to show that the title was in Palmer at his death. It was competent for the plaintiff to show that the title had remained in, and had never passed from, the representative of Palmer's estate; because, in so doing, he would prove that neither of the defendants was the owner of the property, and that he was entitled to maintain his action against them, as wrongdoers, upon his mere possession. The evidence which the court rejected would have tended to show, that the property had never been in any wise administered upon, and thus contributed to support the argument that the title remained in the estate of Palmer. The evidence of the marriage of Mrs. Tarry with the administrator of Palmer's estate contributed to the establishment of a connection of her possession,

with an unlawful conversion of the property by the administrator of Palmer's estate. The entire evidence of plaintiff, rejected by the court, had a bearing upon the question of title raised by the evidence of defendants, and should have been admitted. It may be that other inferences, not favorable to the plaintiff, may be legitimately argued from the testimony. That is not a matter for our decision. It is a question for the jury. We decide nothing more, than that the testimony was relevant. What influence shall be accorded to it, it is not our province to determine.

The nonsuit is set aside, the judgment of the court below reversed, and the cause remanded.

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### PARISH'S ADM'R vs. GALLOWAY.

[BILL IN EQUITY FOR RECOVERY OF SLAVES, ACCOUNT, &C.]

1. *From what decree appeal lies.*—An appeal does not lie from a decree in chancery, dismissing a cross bill, and continuing the original cause.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. WADE KEYES.

THE original bill in this case was filed by Eleazar Galloway, against William Parish and Roger Parish, who were the brothers of the complainant's wife, and sought, 1st, to recover certain slaves in the possession of said Roger, which the complainant claimed under a deed from Anna Parish, deceased, who was a sister of his wife; 2dly, to set aside as fraudulent an instrument of writing by which complainant released his interest in said slaves to said William Parish; 3dly, to enjoin an action at law for the recovery of said slaves, which said William Parish had instituted against said Roger Parish, and which was predicated on the said fraudulent release; and, lastly, an account of the hire of the slaves, and general

relief. The defendant Roger Parish filed a cross bill, setting up title in himself to the slaves as the administrator of Edward Parish, deceased, who was the father of said Anna, William and himself; insisting that, under the will of said Edward Parish, which was made an exhibit to the cross bill, said Anna Parish took only a life estate in the slaves, and, consequently, had no right to convey them to the complainant; and praying that said deed from Anna Parish to the complainant, as well as the release from complainant to William Parish, might be canceled. The cause was submitted to the chancellor, by agreement of counsel, for decision on the single point involved in the construction of the will of Edward Parish; and he, being of opinion that Anna Parish took an absolute estate in the slaves under said will, and not merely an estate for life, dismissed the cross bill, but continued the original cause. From this decree Roger Parish now appeals, and assigns as error the dismissal of his cross bill.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

PUGH & BULLOCK, *contra*.

STONE, J.—A cross bill is one means of defense to an original bill, and, as a general rule, its fate is not necessarily decisive of the main suit. It may fail for want of necessary averments, or defect of proof, and still the complainant in the original bill may obtain no relief, for want of equity in his bill, or for a like defect of proof. See *Andrews v. Hobson*, 23 Ala. 219; *Dill v. Shahan*, 25 Ala. 694; *Nelson v. Dunn*, 15 Ala. 501; *Daniel's Ch. Pr.* 1742.

In this case, the chancellor dismissed the cross bill, and continued the case made by the original bill. This is not a final decree, under section 3016 of the Code. As well might it be contended, that a judgment of the circuit court, sustaining a demurrer to one of two or more pleas, and then continuing the cause, was a final judgment, as that this is a final decree. Indeed, there is no decree



whatever, on any phase of the case presented by the original bill.

This court has no jurisdiction of the appeal, and, *ex mero motu*, dismisses it.

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### McREE vs. McREE.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Notice*.—On the final settlement of an administrator's accounts under the act of 1854, (Session Acts 1853-4, p. 24,) the same notice must be given as in case of final settlements under section 1805 of the Code; and if the day appointed in the notice happen to fall on Sunday, the court has no authority to proceed with the settlement on the next day.

#### APPEAL from the Probate Court of Lowndes.

IN the matter of the estate of John B. McRee, deceased, on the application of James C. McRee and A. W. Hurst, as the administrators of Caleb P. McRee, deceased, for a final settlement of their intestate's administration on the estate of said John B. McRee. The application was filed on the 14th December, 1857; and the court thereupon appointed the 10th January then next for the settlement, and ordered notice and publication in the usual form. On the 11th January, (the 10th being Sunday,) the court proceeded with the settlement, and rendered a final decree; reciting therein that no objections or exceptions were made to any item in the account filed by the administrators; directing them to deliver to W. W. L. McRee, as the administrator *de bonis non* of said John B. McRee, all the notes and other assets in their hands belonging to the estate of said John B. McRee; and further ordering that, on their complying with said decree, they and their intestate be discharged from all liability to the estate of said John B. McRee. The transcript contains also the receipt of said W. W. L. McRee, the administrator *de*

*bonis non* of said John B. McRee, for the notes, accounts, &c., transferred to him by said James C. McRee and A. W. Hurst; but there is no bill of exceptions in the case, nor does the decree in any manner refer to said receipt. The appeal is taken by said W. W. L. McRee, who assigns as error the rendition of the decree without legal notice, and without proper parties.

J. F. CLEMENTS, and W. F. WITCHER, for appellant.

GEO. S. COX, *contra*.

A. J. WALKER, C. J.—The statute requires that notice of the day appointed for the final settlement of an administrator's accounts should be given.—Code, § 1805. We think the proceedings under the act of 1853–4 (Pamph. Acts, 24,) must be conformable to those prescribed in the Code, and that the same notice would be requisite under that act as under section 1805 of the Code. In this case, the settlement was not made on the day previously appointed, and of which notice was given, and there was no adjournment over from the appointed day. The day appointed was Sunday, and upon that day the court could not act in reference to the settlement. The court had no authority to proceed with the settlement on the succeeding day to that appointed, notwithstanding the appointed day was Sunday. If he could proceed at such time, the law requiring the appointment of a day and notice would be practically abrogated. When the notice specifies a day, on which the court sits, and commences a term continuing on beyond the appointed day, the case might be altogether different from this; and our decision is not intended to embrace such a case.

The receipt copied into the transcript is a matter not belonging to the record, and we cannot look to it for any purpose. There is, therefore, nothing before us upon which the argument of the appellee, that the appeal should not be heard, can be based.

The decree of the court below is reversed, and the cause remanded.

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## WILLIAMS vs. NOLEN.

[TROVER FOR CONVERSION OF BALES OF COTTON.]

1. *Tenancy in common created by letting on shares.*—A contract, by which the owner of land lets it to another for cultivation, and agrees to receive as compensation a portion of the specific products, creates a tenancy in common between them in such products.
2. *When action lies not between tenants in common.*—One tenant in common cannot maintain an action of trover against his co-tenant, without proof that the common property has been destroyed, sold, or otherwise disposed of by the defendant.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. C. W. RAPIER.

THE transcript in this case is very defective, containing only the judgment, bill of exceptions, and appeal bond. The action was brought by Daniel Nolen, against William Williams, and it seems to have been either detinue for the recovery of certain bales of cotton, or trover for their conversion. It appeared in evidence on the trial, as the bill of exceptions shows, that the cotton was raised by one William Wright, in the year 1854, on land which he had rented from the defendant, Williams; and that the stipulation of the contract between them was, "that said Williams was to have for the rent of said land one-fourth" of the cotton made on it." The plaintiff claimed the cotton under a mortgage, dated the 18th May, 1854, by which said Wright conveyed all his growing crop, "consisting of corn, fodder and cotton," to secure the payment of certain promissory notes, amounting in the aggregate to about \$130, then due and owing from him to plaintiff. The plaintiff offered this mortgage in evidence on the trial, and the court admitted it, against the defendant's objection. Several exceptions were reserved by the defendant to the rulings of the court in reference to the proof of its acknowledgment and registration, none of which, however, require any particular notice. "The



plaintiff proved, that he demanded said cotton of defendant before the commencement of this suit, and offered to pay him whatever said Wright owed him; that defendant refused to deliver the same, or any part thereof; that said cotton consisted of five bales, weighing five hundred pounds each, and was worth seven cents per pound at the time of said demand; also, that when defendant commenced reducing said cotton to his possession, said Wright objected to his taking the same, and notified plaintiff to assert his right as mortgagee; that notwithstanding such objection, and against plaintiff's consent, defendant took the whole of said cotton, ginned and packed it, and hauled it to market, and it was in his possession at the time of said demand. There was no proof that defendant had directly refused to account with said Wright in respect to said cotton; but, on the contrary, it was shown that he had told Wright that he would come to a settlement with him, and that there were unsettled matters of account between him and Wright, leaving it doubtful which would be indebted to the other on settlement. It was admitted, that the cotton sued for was sufficient to pay the defendant's entire claim for rent, and also the unpaid balance of the plaintiff's debt, which amounted to about \$70. This being all the evidence in the cause, the court charged the jury, that if they believed the evidence, they must find for the plaintiff, to the extent of the unpaid balance of his debt." This charge, to which the defendant excepted, is now assigned as error, together with all the other rulings of the court to which he reserved exceptions.

JAS. L. PUGH, for appellant.

E. C. BULLOCK, *contra*.

STONE, J.—In *Smyth v. Tankersley*, 20 Ala. 212, it was held, that a contract, by which the owner of land lets it to another, and agrees to receive as compensation a portion of the specific products, is a letting on shares, and creates a tenancy in common in such products. The contract between Williams and Wright, as disclosed by

the evidence, brings this case precisely within the principle above stated, and constitutes Williams one of the tenants in common, in the right to the cotton in controversy.

[2.] There being no pleadings in this record, we are left in doubt as to the form of the action. Trover is the action most favorable to the accomplishment of the plaintiff's wishes. We may concede, for the purposes of this appeal, that the action was trover, and still the judgment must be reversed. The bill of exceptions purports to set out all the evidence. It is nowhere shown that the cotton had been destroyed, sold, or otherwise disposed of. For aught that we can know, the cotton was in the possession of Williams when this suit was brought. He had an equal right with his co-tenant to the possession, and the possession of one was the possession of both. This precise question was considered, and so ruled, in the case of *Perminter v. Kelly*, 18 Ala. 716.

The ruling of the circuit court was in conflict with these views.

Reversed and remanded.

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### JOHNSON vs. LIGHTSEY.

[ACTION BY CARRIER FOR FREIGHT—RECOURPMENT OF DAMAGES.]

1. *Relevancy of evidence on question of negligence.*—Where the question at issue is, whether or not a carrier by water was guilty of negligence in the transportation of freight, the fact that he communicated by telegraph with a point above on the river, after his boat had stranded, for the purpose of ascertaining the stage of water at that point, may be relevant evidence for him; consequently, if such evidence is admitted by the primary court, its ruling will be affirmed on error, unless the bill of exceptions negatives the existence of any circumstances which would render the evidence admissible.
2. *Same.*—In such action, a delay by the carrier having been shown, from which injury might have resulted, he may show that, before the commencement of the voyage, the plaintiff consented that such delay should occur; the maxim applies, *volenti non fit injuria*.

3. *Same*.—It having been shown that the carrier, at the time of the accident which caused the injury complained of, was descending the river with two flat-boats lashed together, he may show that flat-boats were frequently carried down the river in that manner, and that it was a customary mode of navigating the river.
4. *Competency of agent as witness for principal*.—In an action by a carrier to recover freight, the defense being set up that the cargo was damaged by his negligence, and that the defendant is entitled to recoup for such damages, the pilot who had charge of the flat-boat at the time of the accident, is a competent witness for the plaintiff, unless it is affirmatively shown that the same act of negligence on his part, which caused the damage to the defendant's goods, also made the pilot liable to an action at the suit of the plaintiff.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Josiah Lightsey, against William Johnson, to recover the freight agreed to be paid by the defendant for the transportation of several hundred bales of cotton from Selma to Mobile, at the rate of one dollar and a quarter per bale. The defense set up was, that the cotton was injured in the transportation by the plaintiff's negligence, and that the defendant was entitled to recoup the damages thereby occasioned. The bill of exceptions in the case is very imperfect, being neither signed nor sealed by the presiding judge, and appearing to be unfinished in other particulars; but, by agreement of counsel, these defects were waived. The principal facts, so far as they are deemed material to a correct understanding of the legal principles decided, are the following:

In May, 1855, the plaintiff agreed with the defendant and others to carry about twelve hundred bales of cotton, of which about four hundred bales belonged to the defendant, from Selma to Mobile, in flat-boats, at the rate of one dollar and a quarter per bale. The cotton was put on three flat-boats at Selma in June, and reached the consignees in Mobile some time in July, having been damaged on the river to the extent of five or six dollars per bale. The bills of lading, which were offered in evidence by the defendant, contained the customary clause excepting dangers of the river. The plaintiff offered one



Norris as a witness, who was the pilot employed by him to take the flat-boats down the river, and by whom they were taken down. The defendant objected to the competency of this witness when offered, and moved the court, after the evidence was closed, to exclude his testimony from the jury; reserving exceptions to the overruling of each motion.

The witness Norris testified, "that he had been a pilot on the Alabama river, on steamboats, for four years before 1855, but had never been a pilot on a flat-boat; that he was employed by plaintiff to take said flat-boats to Mobile, and did take them to Mobile; that he started from Selma with two of the boats, and, in passing a place called 'White's Shoal,' with the two boats lashed together, one of them stranded, and had to be left behind; that it remained there some five or six days, and was then taken off by a person employed for that purpose by the defendant; that the channel of the river, at 'White's Shoal,' was narrow and dangerous, and the stream rapid; that one boat at a time could have entered or passed with safety, and both boats could have been taken through together if he had known the channel; and that he went on down the river, to a place called 'Upper Peach Tree', and telegraphed back to Selma, to know whether the river was rising. To this last statement of the witness, as to his having telegraphed to Selma, the defendant objected, as irrelevant; the court overruled the objection, and the defendant excepted."

"Said witness further testified, that when he left Selma, it was the understanding that he was to take two of the boats, and go to 'Upper Peach Tree,' leave them there, and return to Selma for the other; that this was the understanding between plaintiff and defendant's agent, at the instance of said agent. To this evidence the defendant objected, as illegal and irrelevant; but the court overruled the objection, and he excepted. Plaintiff asked said witness, 'if it was usual on the Alabama river for flat-boats to go down two lashed together'; and the witness answered, 'that he had sometimes seen one boat, and sometimes two and three boats lashed together, going

down the river'. The defendant objected to this question and answer, each, because the evidence was illegal and irrelevant; and excepted to the overruling of his objections. There was other evidence, tending to show that, at that time, it was customary on the Alabama river for flat-boats, laden with cotton, to descend the river, two lashed together; to which proof, also, the defendant excepted."

The rulings of the court on the evidence, as above stated, are assigned as error.

ALEX. WHITE, for appellant.

J. R. JOHN, and JNO. T. MORGAN, *contra*.

A. J. WALKER, C. J.—We cannot affirm that the court erred in the admission of evidence, unless the vice of its ruling is apparent from the bill of exceptions. The entire evidence in this case does not seem to be set forth in the bill of exceptions. It is conceivable that, in a case where the negligence of a carrier by water is the point of controversy, the fact of his communicating with a point above on the river, as to the stage of the water, might be material and relevant. For example, if a boat were aground, it might be a matter of proper caution for the carrier to ascertain, by telegraphic communication, whether there was a prospect of an early rise in the river; the existence, or want of such a prospect, might materially influence the judgment of a prudent man in such a contingency; and it might be that the failure to resort to the telegraph for information, as to the approach of a rise, would justify an argument against the carrier as to the exercise of proper diligence. The bill of exceptions does not negative the existence of circumstances, in which the testimony would have been relevant; and presuming in favor of the correctness of the ruling in the circuit court, we regard it as justified by the facts of the case, as they were presented to that court.

[2.] The defendant could not complain that there was a delay at 'Upper Peach Tree,' while the pilot returned for other boats, if such delay was pursuant to his agreement,

made through his agent. He could recover no damages for injury resulting from a delay to which he assented. *Colbert v. Daniel*, 32 Ala. 14. It was, therefore, permissible for the plaintiff to prove, that there was an "understanding," before the commencement of the voyage, with defendant's agent, that such delay should occur; because it afforded an excuse for that from which negligence might otherwise have been argued.

[3.] The fact that two boats, lashed together, had frequently been taken down the river, had a material and direct bearing upon the question, whether there was negligence in the plaintiff's adopting the same plan. The tendency of the proof was to demonstrate that the plaintiff, in lashing two boats together, did not adopt a new and untried plan of navigation, but one which had been successfully practiced before. There was, therefore, no error committed in permitting the plaintiff to prove by his witness, "that he had seen sometimes one boat, at other times two and three boats, lashed together, going down the river;" and that it was customary on the Alabama river for flat-boats, laden with cotton, to descend two lashed together.

[4.] The remaining question to be considered in this case, is, whether the pilot on the boats, freighted with the defendant's cotton, was competent to testify as a witness for the plaintiff. As the defendant prosecutes his claim against the plaintiff by plea of set-off, the question is to be considered as if the defendant were prosecuting a suit against the plaintiff, and the latter were offering the witness for his protection against a recovery. The argument for the appellant is, that the agent, for whose wrongful act, injuring the property of a third person, the principal is sued, must be an incompetent witness for the principal, where the same act which renders the principal liable, also makes the agent liable to the principal. In such a case, the agent would certainly be incompetent to testify for his principal, at the common law.—*Bank of Oswego v. Babcock*, 5 Hill, 152; *Middlekauff v. Smith*, 1 Md. R. 329-341; *McClure v. Whitesides*, 2 Carter's Ind. 573; *Green v. New River Company*, 4 Term R. 589; *Gardner*



& Devereaux v. Smallwood, 2 Hay. 349; 4 Stark. on Ev. 768.

If the question of the incompetency of the witness remains as it was at common law, we cannot affirm, upon the record before us, that the court erred in permitting the witness to testify. The incompetency of the witness, in such case, depends altogether upon the fact of the agent's liability to the principal. The conduct of the agent must, therefore, have been wrongful in reference to the principal, as well as to the injured person. It may have been such as to have rendered the principal liable, without involving any breach of duty on the part of the agent or pilot to the principal. An example would be presented, if an agent should act wrongfully with the consent of his employer.—Barnes v. Cole & Fitzhugh, 21 Wend. 188; Noble v. Paddock, 19 Wend. 456; Juniata Bank v. Beale, 1 W. & S. (Pa.) 227; Stewart v. Kip, 5 J. R. 256; Smith v. Seward, 3 Barr, 342; Hawkins v. Finlayson, 3 C. & P. 305; Whitmore v. Waterhouse, 4 *ib.* 383.

The competency of persons, not parties to the record, is presumed until the contrary appears, and the *onus* is upon the objector to show the incompetency. It is not enough that a mere probability of incompetency should be raised; the facts upon which it depends must be fairly established, as must the affirmative of every issue of fact in judicial proceedings.—Rives v. Plank-Road Company, 30 Ala. 92. It devolved upon the defendant to establish, that the very act or acts of negligence, which constituted the *gravamen* of his action, gave rise to a cause of action by the plaintiff against the pilot. This does not appear from the bill of exceptions to have been done. The causes of the plaintiff's damage are not traced to a misfeasance or malfeasance of the pilot in reference to the master. If there was improper delay, or if there was imprudence in lashing two boats together, it would be quite as reasonable to attribute those wrongs to the master, (who may have been upon the boats, for aught that is disclosed by the record,) as to the pilot. If it be said that the testimony shows that the stranding

of the boat was attributable to the pilot, a satisfactory reply is, that it does not appear that the stranding was the cause of the injury complained of.

The judgment of the court below is affirmed.

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### THOMASON *vs.* DILL.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF SLAVE.]

1. *Conclusiveness of judicial decisions.*—A decision of the supreme court is the law of the case in which it was pronounced, and is conclusive, both in the primary court, and on a second appeal.
2. *When contract of sale is complete, and what constitutes valid modification.*—The rulings of the court in this case, in the matter of instructions to the jury, tested by the principles settled on a former appeal, (*Thomason v. Dill*, 30 Ala. 444.) and held correct.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. S. D. HALE.

THIS action was brought by John F. Dill, against Francis M. Thomason, and was founded on the defendant's promissory note, under seal, for \$800, the purchase-money of a slave. The defendant pleaded the general issue, in short by consent, with leave to give any special matter in evidence which might be a defense to the action; and plaintiff replied in like manner. The case was before this court, at its January term, 1857, when the judgment of the circuit court was reversed, and the cause remanded. See the case reported in 30 Ala. 444. The evidence offered on the second trial in the court below, as disclosed by the bill of exceptions in the present record, was substantially the same as on the former trial. A statement of the facts in detail may be found in the former report, above referred to; for the purposes of the present appeal, the material facts may be briefly stated thus:

The note sued on was given for the purchase-money of a slave, named Ellick, sold by plaintiff to defendant. The contract of sale was made on the 26th April, 1853; the note and bill of sale both being executed and delivered on that day. The negro, when brought up to be delivered to the purchaser, expressed great unwillingness to go with him; and the plaintiff's wife begged him to rescind the contract. The defendant refused to rescind, but left the negro in the plaintiff's possession; the latter promising to bring the negro, on the next morning, to Ashville. On the next day, the plaintiff carried the slave to Ashville with him, and again proposed a rescission of the contract; which the defendant again declined. The plaintiff then insisted that the defendant, in accordance with a proposition made by himself during the previous negotiations, should give a note with surety for the purchase-money; and to this the defendant assented. The character of this subsequent agreement—whether it amounted to a valid modification of the contract of sale, or was merely *nudum pactum*—was one of the principal points of controversy in the case. When the parties separated, the negro remained in the plaintiff's possession, and committed suicide a few days afterwards.

The defendant requested the court to give the following charges to the jury:

"1. If the jury believe from the evidence that plaintiff sold the negro Ellick to defendant, and took the note sued on for the price, and delivered the bill of sale to defendant, and agreed to deliver the negro, on the next morning, in a condition to go with the defendant; and that he did not deliver said negro on the next morning, but was unwilling to do so, and, as a pretext for the non-delivery, set up that defendant had agreed to give him a note with surety, and refused good security when offered, and, as a further pretext for the non-delivery, insisted that he wanted the note with sureties who resided in the same county with defendant, and did not in fact deliver the negro to defendant, as he had agreed to do, but kept him until defendant could go and get such a note as he required; and that the negro died while thus



in plaintiff's possession, and was worth \$800 at the time of his death,—then they should find for the defendant."

"2. If the jury believe from the evidence that plaintiff insisted on his right to have from defendant, before he would deliver the negro, a note with surety; and that defendant assented to this demand, (whether such assent is shown by direct and positive evidence, or only by facts and circumstances;) and that it was agreed that defendant should bring or send the note with sureties, as required by plaintiff, and should then have the negro,—this would amount to such a modification of the contract of the previous day, as would change it from an executed to an executory contract, and would leave the title in plaintiff; and that if the negro died before the time when the note with sureties was to be delivered, the death of the negro would be plaintiff's loss."

The refusal of these two charges, to which the defendant excepted, is now assigned as error.

MORGAN & MARTIN, for appellant.

PARSONS & J. WHITE, with B. T. POPE, *contra*.

STONE, J.—When this case was before in this court, (30 Ala. 444,) we laid down certain legal propositions, which, so far as they go, are the law of this case, and must not be lost sight of. The testimony on the former record, and in this, is not materially variant on any question which we propose to consider. Among the principles asserted by us when this case was first here, are the following: "The stipulations and agreements entered into, and reduced to writing, on the 26th April, 1853, amounted to an executed contract; passing the title of the slave to Thomason, and securing the payment of the purchase-money to Dill. \* \* \* We think, however, that it should have been left to the jury, under appropriate instructions, to ascertain by their verdict—1st, whether the agreement of the second day was nothing more than a promise by Thomason to give a note with sureties, pursuant to his offer the day before, without any surrender or modification of his right to the slave; 2d,

whether the first note was considered inoperative, and the slave left with Dill in pledge that Thomason would give a new note with stipulated sureties; or, 3rd, whether by agreement the contract was so far modified as to be made executory,—Thomason's right to the slave not to attach until he executed and tendered the proposed note. If either the first or the second proposition be affirmed by the jury, the plaintiff, on a suitable complaint, will be entitled to a verdict. The third proposition would entitle the defendant to a verdict. \* \* \* The testimony shows, that the slave remained with him (Dill) in each instance, by Thomason's permission."

We thus declared, in effect, that during the time the negotiations of the 27th were being conducted, Thomason was negotiating in regard to a slave, the title to which was in him; and that the retention of the possession of the slave by Dill was at least permitted by Thomason. In construing the charges asked and refused, we must keep these facts in view.

Viewing these charges from the above stand-point, we do not think either of them should have been given. All the facts hypothecated in the first charge asked, unaided by others, or by inferences to be drawn by the jury, are perfectly consistent with each of the three propositions stated in our former opinion, and are insufficient to determine whether this case falls within the one or the other of those classes. The second charge asked is almost equally defective. Stripped of the parts about which there is no contest, it makes Dill's right of recovery to hinge on the inquiry, whether he *insisted* on his right to have a note from Thomason with sureties, before he would deliver up the negro, and Thomason's assent to this *demand*. This is not necessarily an averment of a change or modification of the contract. Dill may have *insisted* on his right to have a new note with sureties, in virtue of the offer of Thomason, made the day before, to give such new note, if Dill should afterwards desire it. Thomason may have assented to this *demand*, (of a new note with sureties,) because he regarded it as *a matter of honor*, as testified by some of the witnesses. He may have left the slave in the

hands of Dill in pledge, or for his own convenience. Under the charge as asked, the defendant might have succeeded in his defense, in palpable disregard of the principles settled in this case on the former appeal. The defendant was not entitled to a verdict, unless the two parties, Dill and Thomason, agreed—in other words, their minds concurred—in a modification of the contract, such as was mentioned in our former opinion.

The exception to testimony is not insisted on here; and if it were, we think there is nothing in it.

Judgment of the circuit court affirmed.

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### MASON *vs.* STORRS.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Revivor of action by tenant for life.*—If tenant for life bring a real action in nature of ejectment, and die pending the suit, the action cannot, either at common law, or under section 2158 of the Code, be revived in the name of the remainder-man, but can only be revived in the name of the personal representative of the deceased tenant for life.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by Mrs. Jane R. Storrs, to recover a lot in Wetumpka, of which the defendant, Thos. W. Mason, was in possession, together with damages for its detention; and was commenced on the 4th September, 1855. The plaintiff claimed the lot in controversy under the will of her deceased husband, Seth P. Storrs, by which it (with other property) was devised and bequeathed to her, during her natural life, for the support and maintenance of herself and children by the testator, with remainder to the children. The death of the plaintiff having been suggested, the suit was revived in the name of her



personal representative and heirs-at-law, and also in the name of the heirs-at-law of said testator; the children of said testator and plaintiff being the heirs of each. The defendant excepted to the action of the court in permitting the revivor of the suit in the names of these parties, and he now assigns it as error.

WATTS, JUDGE & JACKSON, for appellant.

ELMORE & YANCEY, *contra*.

A. J. WALKER, C. J.—The widow of Seth P. Storrs was, under his will, only a tenant for life of the legal estate. Her estate terminated by death. The children of her deceased husband and herself were entitled to the estate in remainder. Upon the death of a tenant for life, a pending action in her favor, for the recovery of land, cannot be revived in favor of the remainder-men. The remainder-men are neither heirs, devisees, nor personal representatives of the tenant for life; and cannot, therefore, assert, in an action commenced by the tenant for life, their title in remainder. They are not within the statute authorizing the revivor of “actions to try the title, or for the recovery of the possession of lands,” (Code, § 2158;) and there is certainly no rule of common law, authorizing a revivor in their favor.—Adams on Ejectment, 320. Upon the death of the tenant for life, the revival should have been in the name of her personal representative alone, as nothing besides the damages could be recovered.

The judgment of the court below is reversed, and the cause remanded.

KNOWLES *vs.* LEE & LARKINS.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Proof of book account.*—In an action on an open account for goods, wares and merchandise sold and delivered, the only evidence being the testimony of plaintiff's clerk, who stated, in substance, that the items in the account were charged to defendant, on plaintiff's books, in his (said clerk's) handwriting; that he would not have so charged them, if the goods had not been actually sold and delivered by him to defendant; and that, independently of the entries on the books, he had no recollection whatever of the sale and delivery of the goods,—the court may instruct the jury to find for the plaintiff, if they believe the evidence, for the amount of the account and interest thereon.

APPEAL from the Circuit Court of Coffee.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Lee & Larkins, as the assignees of Pruitt & Cothran, a mercantile firm in the town of Elba, against Green B. Knowles; and was founded on an open account for \$70 85, for goods, wares and merchandise sold and delivered to said defendant during the year 1855. A judgment by default was rendered against the defendant, but he appeared on the execution of the writ of inquiry, and contested the correctness of the account. "On the trial," as the bill of exceptions states, "the plaintiffs proved, by one Lee, that the goods mentioned in said account were charged to defendant, in the handwriting of witness, on the books of said Pruitt & Cothran; that he (witness) was at that time the clerk of said firm; that he would not have made said charge, if the goods had not been actually sold and delivered by him to said defendant; that he never charged any goods except what he himself sold; that, further than this, he had no recollection whatever of the sale and delivery of the goods; that his recollection was derived solely from the books, and from the fact that the entries would not have been made unless the goods were sold, and not from

the sale and delivery of the particular goods as independent facts; that he did not recollect such sale and delivery as independent facts, even after refreshing his memory by an inspection of the books; and that said account was due on the 1st January, 1856. This being all the evidence in the case, the court charged the jury, that they must find for the plaintiffs, if they believed the evidence, for the amount of the account and interest from the time the same was shown to have been due." This charge, to which the defendant excepted, is the only matter assigned as error.

PUGH & BULLOCK, for appellant.

MARTIN, BALDWIN & SAYRE, *contra*.

STONE, J.—We think the charge of the court in this case is free from error. The witness had testified, that he was clerk of the firm of Pruitt & Cothran, and had charged all the goods for which appellant was sued, in his own handwriting; that he never charged any goods which he did not himself sell; and that he would not have made the charges, if he had not sold the goods. The truth of this evidence was referred to the jury. In referring the question of the credibility of this evidence, the court said to the jury, in effect, that if they found *the facts* to be as the witness had stated them, then the account was proved. If the jury were not satisfied that the witness was worthy of credit, or if they distrusted his memory, then they could not, upon his unaided testimony, *believe the evidence*. However much that body may have confided in his integrity, still, if from the manner of the witness, or the language he employed, they did not confide in the correctness of his memory, this would present a case where the jury neither could nor would believe the evidence. In other words, the evidence would fail to convince them that *the facts* existed, as the witness had stated them. On the other hand, if it be true that the witness charged each item composing this account, and that he made no charge save of goods sold by himself, then it is true and proved that each article of the account



was sold and delivered to the defendant. The evidence was in form unexceptionable.—Wright v. Bolling, 27 Ala. 259; Head v. Shaver, 9 Ala. 791.

Judgment affirmed.

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PEARCE vs. NIX.

[BILL IN EQUITY BY PURCHASER TO OBTAIN CONVEYANCE]

1. *Sufficiency of proof to disprove answers.*—Where a material allegation of the bill is denied, on information and belief merely, by all the defendants, except one as to whom an answer under oath was waived, and by whom the allegation is denied from knowledge, it is not incumbent on the plaintiff (Code, § 2877) to establish the fact by two witnesses, or by one witness with corroborating circumstances.
2. *Admissibility of assignor's declarations as evidence against assignee.*—The admissions or declarations of the vendor, as to the payment of the purchase-money by the purchaser, are competent evidence against one to whom he afterwards conveys the land, in a suit instituted against them jointly by the purchaser to compel a conveyance of the title.
3. *Estoppel against tenant by acknowledgment of title in another.*—A purchaser of land, who is in possession under a bond for titles executed by his vendor, and who afterwards acknowledges the validity of a third person's title, obtained by contract with his vendor, and consummated by patent from the United States, is not thereby estopped from setting up his own equitable title against such third person, when it appears that his acknowledgment was made under a misapprehension as to the conclusiveness of the patent against his superior equity.
4. *Application of maxim, that he who seeks equity must do equity.*—When a purchaser of land, holding possession under his vendor's bond for title, files a bill in equity against the vendor and a subsequent purchaser, to obtain a conveyance of the legal title, which such subsequent purchaser has procured by patent from the United States, the complainant will be required, before obtaining any relief, to repay to the subsequent purchaser the amount expended by him in procuring his patent, with interest.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by William Pearce, the appellant, against Joseph M. N. B. Nix, Thomas T. Wall,

and Timothy Church; and sought to obtain a decree for the legal title to a quarter-section of land, which the complainant claimed under a joint purchase by himself and Church from said Nix, together with a subsequent transfer to him by Church of the latter's interest; and to which the defendant Wall, having subsequently purchased from Nix, procured a patent from the United States. The bill was filed on the 9th May, 1853. The purchase by the complainant and said Church was made on the 1st Sept., 1840. The bill alleged, that the complainant entered into the possession of the land soon after his purchase from Nix, and continued in possession, by himself and his tenants, up to the filing of the bill; that Nix executed to him and Church a bond, conditioned to make title to the land on the payment of the unpaid portion of the purchase-money,—a portion having been paid at the time the contract was made; that the balance of the purchase-money, with interest, was afterwards paid in full; and that Wall, having notice of the complainant's possession and equitable rights under his contract, subsequently entered into some arrangement with Nix, and procured a patent for the land from the United States, and had instituted an action at law against the complainant to recover the land. The prayer of the bill was for an injunction of the action at law, an account, a decree for the legal title to the land, and general relief.

All the defendants filed answers. Wall, who was in fact the principal contesting defendant, denied notice of the complainant's equitable rights, and insisted that he was entitled to protection as a *bona-fide* purchaser for valuable consideration; alleging, also, that the complainant had acknowledged his superior title under the patent, and had promised to deliver up the possession of the land.

On final hearing, on pleadings and proof, the chancellor held, that Wall was not entitled to protection as a *bona-fide* purchaser without notice; but he dismissed the complainant's bill, for want of sufficient proof of the payment of the purchase-money; and his decree on that point is now assigned as error.

ELMORE & YANCEY, for appellant.

N. S. GRAHAM, *contra*.

A. J. WALKER, C. J.—The question chiefly discussed in this case is as to the sufficiency of the testimony to establish the payment of the purchase-money of the land in controversy. The payment alleged in the bill is not denied by any of the defendants, except Nix, on the authority of a knowledge of the facts. As to Nix, there is a waiver of answer on oath. Because the defendants, besides Nix, do not deny the allegation from knowledge, and because an answer on oath by Nix is waived, it was not incumbent on the complainant to establish the fact alleged by two witnesses, or by one with corroborating circumstances.—Code, § 2877.

[2.] One witness, Kelly, proves positively the declaration of Nix, made before his transfer to Wall, that the purchase-money due on account of the purchase of complainant and Church was paid. This admission of Nix, made before his transfer to Wall, is evidence against the latter.—Gillespie v. Burleson, 28 Ala. 551; Jennings v. Blocker, 25 Ala. 415.

The declaration of Nix, proved by Kelly, is corroborated by other circumstances in this case. Those circumstances are—that Nix executed an instrument, acknowledging that there was, or would be, due to the complainant, on 1st January, 1845, two hundred and thirty dollars, to be paid on certain notes held by Nix on the complainant; that the sum therein mentioned corresponds very nearly with the amount which at that time (1 Jan., 1845) would be due to Nix on account of the purchase of the land; and that the correctness of the other debts of Nix against Pearce, which are set up as the debts intended to be paid with the two hundred and thirty dollars, is improbable. The reasons why the correctness of these last-named debts is not probable, are their antiquity, and the fact that Nix twice allowed accounts of Pearce, as credits on the purchase-money of the land, when, if those debts were correct, it would have been more appropriate and natural to have made the credits on them.



[3.] If it be conceded, that Pearce acknowledged himself the tenant of Wall, he would not be estopped from asserting his right in equity to the land. He was in possession, holding and claiming title under his equitable right, at the time of the transaction which is supposed to evidence an acknowledgment of tenancy. He did not obtain possession by virtue of such an acknowledgment. The acknowledgment of tenancy, if made at all, was the result of an entire misapprehension and mistake of Pearce, as to the conclusiveness of Wall's patent against his subsisting equity. Such an acknowledgment, made under such a misapprehension and mistake, by one in possession under his own equitable title, does not operate an estoppel. *Jackson v. Spear*, 7 Wend. 401; *Washington v. Conrad*, 2 Humphreys, 562; *Jackson v. Leek*, 12 Wend. 105; *Rogers v. Pitcher*, 12 Petersdorff's Ab. 37; *Smith v. Curtis & Cobb*, 11 Verm. 323; 2 Smith's L. C. 658, note to *Doe v. Oliver*.

[4.] The complainant, seeking equity, must do what equity and justice require. He must pay to the defendant Wall the money expended by him in procuring the patent in Washington city, with interest; and such payment must be a condition precedent to his obtainment of any relief in this case.

The decree of the court below is reversed, and the cause remanded, that the chancellor may render a decree consistent with the foregoing opinion, and for further proceedings in pursuance of such decree.

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## FLASH, HARTWELL & CO. vs. FERRI.

[ACTION BY CARRIER FOR FREIGHT—RECOURPMENT OF DAMAGES.]

1. *Examination of parties as witnesses.*—When the plaintiff seeks to establish the correctness of his demand by his own oath, (Code, § 2313,) and is cross-examined concerning his testimony on a former trial relative to the cross demand set up as a defense, the defendant has no right to impeach him by contradicting his testimony as to such former statements.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Joseph Ferri, against the appellants, to recover the freight agreed to be paid for certain hogsheads of sugar and molasses, transported by him from New Orleans to Mobile for the defendants. The defendants pleaded the general issue, and also insisted, under a special plea, that they were entitled to recoup damages for injuries and losses to the cargo. "On the trial," as the bill of exceptions states, "it was a material question whether five hogsheads of sugar, shipped on board plaintiff's vessel in New Orleans, to be delivered in Mobile, were in like condition when delivered as when received in New Orleans. The plaintiff was put on the stand as a witness for himself, (the amount of his claim being about \$70,) and, on his examination in chief, stated that said hogsheads were in the same condition when delivered as when received. On cross-examination, having stated that there were auger-holes bored into the staves of said hogsheads, stuffed with cotton, he was asked whether, on his examination as a witness in like manner on a former trial of this cause, he did not say, that there were no holes bored into the staves of said hogsheads when they were received on board his vessel in New Orleans, and delivered in Mobile; and answered, that he did not make any such statement, but testified on that occasion as he did on this as to the condition of said hogsheads. One of the defendants was then put on the stand, as a witness for the defense, and, with a view of impeaching the credit of plaintiff as a witness, was asked whether he recollected the testimony given by plaintiff on the former trial, as to the condition of said hogsheads. Having answered that he did recollect it, he was asked to tell the jury what the plaintiff swore on that occasion. To this question, with the proposed answer, the plaintiff objected; the court sustained the objection, and the defendant excepted." This ruling of the court is now assigned as error.

W. C. EASTON, for appellant.

JOHN HALL, with H. CHAMBERLAIN, *contra*.

STONE, J.—The act of 1839 (Clay's Dig. 342, § 161) has been repeatedly considered by this court.—See *Hudgins v. Nix*, 10 Ala. 575; *Hayden v. Boyd*, 8 Ala. 323; *Richards v. Griffin*, 5 Ala. 195; *Yarborough v. Hood*, 13 Ala. 176; *Anderson v. Collins*, 6 Ala. 783; *Bennett v. Armstead*, 3 Ala. 507. The Code, (§ 2313,) so far as the question we are considering is involved, is not materially different from the act of 1839.—*Waring v. Henry*, 30 Ala. 721.

The authorities above cited are decisive to show there is no error in this record.

Judgment of the city court affirmed.

## LUCAS vs. DANIELS.

[DETINUE FOR SLAVES.]

1. *Form of verdict and judgment for defendant in detinue*.—If the plaintiff in detinue fails to give the bond and affidavit necessary for obtaining the possession of the property sued for, but leaves it in the undisturbed possession of the defendant, he cannot complain on error that the jury, in returning a verdict for the defendant, did not assess the value of the property; nor that the court, in giving judgment for the defendant, did not render judgment for the property or its alternate value, with damages for its detention: section 2194 of the Code is not applicable in such case.
2. *Surrender of title acquired by adverse possession*.—If the husband, having acquired title to a slave by adverse possession against the true owner, verbally consents to the execution of a deed of gift by the latter, conveying the slave to a trustee for the benefit of the husband's wife and children, it is a question for the determination of the jury, whether the husband's prescriptive title is thereby surrendered; and a charge, asserting that such consent would not divest the title acquired under the statute of limitations, is an invasion of their province.
3. *What constitutes adverse possession*.—An open, notorious and public claim of title to a slave in another State, by one who acquired and held possession in this State, up to the time of his removal, in subordination to the title of another, is not sufficient to constitute an adverse possession against the



true owner, who continues to reside in this State : there must be a disclaimer of the original title, and an actual hostile possession, of which the true owner had notice, or which was so ostensible and notorious as to afford a reasonable presumption of notice.

4. *When outstanding title may be set up as defense.*—In detinue by the surviving husband, against one of his sons-in-law, the defendant may set up an outstanding title in a trustee, to whom the slave was conveyed in trust for the plaintiff's deceased wife for life, with remainder to their children ; and this, notwithstanding the possession was obtained from plaintiff by stealth or violence.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by John Lucas, against John Daniels, to recover three slaves, to-wit, Caroline, Manuel and Perry, together with damages for their detention ; and, on the death of the defendant pending the suit, was revived against Mrs. Susan Daniels, his widow and administratrix. The woman Caroline, who was the mother of Manuel and Perry, belonged to one Livingston Gardner, in South Carolina, in 1820 ; and in 1821, on plaintiff's marriage with Nancy Gardner, a daughter of said Livingston Gardner, went into plaintiff's possession under a loan, or parol gift, from said Gardner to him and his wife. In 1825, plaintiff removed, with his family, from South Carolina to Dallas county, Alabama, and brought said negro woman with him ; and Livingston Gardner removed soon afterwards, and settled in the same neighborhood with the plaintiff. On the 10th November, 1830, Livingston Gardner, with the consent and approbation of plaintiff, conveyed the woman Caroline, by deed of gift, to one Littleton Edwards, as trustee, "to and for the uses and trusts hereinafter expressed—that is to say : to and for the only proper use and benefit of the said Nancy Lucas, wife of the said John Lucas, and her heirs forever ; to be used and employed, as the said Littleton Edwards shall direct, for the benefit of the said Nancy Lucas during her life, and then, in the discretion of the said Edwards, or of such person as he shall appoint his successor, to be used and employed for the benefit of the heirs of the said Nancy Lucas forever, or, at his election,

sold and divided between them." This deed also contained an express provision, to the effect that "the said John Lucas, husband of said Nancy, shall never have any legal or equitable rights, title or claim to said slave, in any manner whatever." The woman Caroline, with her two children, (the latter being born after the execution of the deed of gift above referred to,) remained in the plaintiff's possession, uninterruptedly, until some time in 1851; when, on his removal to Mississippi, said slaves were carried with him, without objection on the part of said Edwards; and in 1856, (at what precise time does not appear,) were taken from his possession, in Mississippi, by stealth or violence, and were in the defendant's possession at the commencement of the suit,—he having previously married one of the plaintiff's daughters by said Nancy. The plaintiff relied on the title acquired by virtue of his marital rights, his possession, and the statute of limitations of Mississippi; while the defendant seems to have set up the outstanding title in Edwards, the trustee, and a deed from said Edwards to himself, dated the 15th January, 1857, which purported to be executed in pursuance of the power conferred on said Edwards by the deed of gift from Livingston Gardner. Mrs. Nancy Lucas, plaintiff's wife, died in 1833. The bill of exceptions purports to set out all the evidence, but a further statement of it is deemed unnecessary.

"The plaintiff asked the court to instruct the jury, 'that if plaintiff held possession of the slaves sued for, in Alabama, for more than six years, by open, notorious and public claim of title against Livingston Gardner, such holding gave him a title to the property.' This charge the court gave. The plaintiff thereupon asked the court to charge the jury, in connection with said charge, 'that if title was acquired in this way, the deed of gift from Livingston Gardner to Edwards, trustee, &c., even with plaintiff's consent, did not divest plaintiff's title, if plaintiff continued in possession of the slave.' This last charge the court refused to give, and the plaintiff excepted."

"The plaintiff asked the court to charge the jury, also, 'that if plaintiff removed from Alabama to Mississippi in

1851, and carried with him the slaves sued for, and kept them there in his possession until November, 1856, under an open, notorious and public claim of title,—then plaintiff is entitled to recover in this action.’ This charge the court also refused to give, and the plaintiff excepted.”

“The plaintiff also asked the court to charge the jury, ‘that if he had possession in Mississippi of the slaves sued for in this action, and they were taken from him tortiously, and run off to Alabama by John Daniels, (the defendant’s intestate,) then the defendant cannot, in this action, set up title in a third person as a defense.’ This charge the court also refused to give, and the defendant excepted.”

The jury having returned a verdict for the defendant, the court thereupon rendered judgment in his favor, that he go hence and recover of the plaintiff his costs.

The errors now assigned are, the refusal of the charges asked by the plaintiff, and the rendition of judgment on verdict for the defendant.

GEO. W. GAYLE, for appellant.

PETTUS, PEGUES & DAWSON, *contra*.

A. J. WALKER, C. J.—In this case no bond or affidavit was made by the plaintiff, for the purpose of obtaining possession of the property sued for. The property was left undisturbed in the possession of the defendant. In such a case, that the jury should, in a verdict for the defendant, assess the value of the property, would be useless; and it would have been improper for the court to have given judgment for the defendant, against the plaintiff, for the property, or its alternate value, with damages for the detention. Section 2194 of the Code is manifestly inapplicable to such a case.

[2.] Although the plaintiff, by adverse possession antecedent to the deed from Livingston Gardner to Edwards, had acquired a right to the slaves in controversy; yet it was competent for him to surrender that title to the true owner, without writing; and the fact of his consenting to a conveyance of such slave by the true owner to another,



was evidence strongly conducing to show a surrender of the title by prescription, if any such had accrued to him. It was a question for the jury to determine, whether a surrender of the title by prescription was made; and, in the determination of that question, the evidence conducing to show a consent by the plaintiff to a conveyance by the original owner, was a matter proper for their consideration. If the court had charged the jury, that the plaintiff's consent to the conveyance by the true owner would not divest a title acquired by the statute of limitations, it would have taken from the jury the power of determining the effect of such consent, as evidence conducing to show a surrender of the title by prescription. Such a charge would certainly have invaded the province of the jury, by impressing them with the idea, that they could not, upon the evidence, find that the plaintiff had surrendered whatever title he might have acquired by adverse possession.

[3.] There was evidence in this case conducing to show that the plaintiff held the slaves in subordination to the title of the trustee in the deed of Livingston Gardner; that the slaves were left by the trustee with the plaintiff, for the benefit of his children; and that while holding them in subordination to the trustee, and for the benefit of his children, the plaintiff carried them to Mississippi, with the tacit consent of the trustee, who remained and continued to reside in Alabama. The second charge, which the court refused to give, was properly refused, unless it is a tenable proposition, that after the plaintiff had so held the slaves up to the time of his going to Mississippi, and after his carrying the slaves to Mississippi under the circumstances above stated, a possession by him for the period prescribed in the statute of limitations of that State, under an open, notorious and public claim of title, would vest the plaintiff with the right to the slaves. The principle asserted by this court in *Harrison v. Pool*, 16 Ala. 174, and *Benje v. Creagh*, 21 Ala. 156, is at war with that proposition. It is settled by those decisions, that when possession is acquired and held for a time, in subordination to the title of the true owner, then, to

constitute an adverse possession, "there must be a disclaimer of the original title, and an actual hostile possession, *of which the true owner had notice, or which is so ostensible and notorious as to furnish a reasonable or prima-facie presumption of notice.*" The whole doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held, and there can be no acquiescence without knowledge.—Cockrell v. Brown, 33 Ala. 38. If the trustee remained and continued to reside in Alabama, while the plaintiff carried the slaves to Mississippi; and the plaintiff, up to the time of carrying them to Mississippi, acknowledged the title of the trustee, it would be incumbent upon him to show that the true owner had actual notice of his hostile possession, or that the hostility of his possession was so ostensible and notorious as to afford reasonable or *prima-facie* presumption of notice. In determining whether or not the notoriety of adverse possession was such as to afford *prima-facie* evidence that it was known to the owner, it would be indispensable to consider the distance of the owner from the place at which such adverse possession was set up, and the fact that it was in another State. If there was a hostile possession in Mississippi, it would be manifestly wrong for the court to presume that it was known to the trustee remaining in the State of Alabama, no matter how public the hostility of the possession may have been in that State. The plaintiff had no right to have the court assert, as a legal proposition, that the possession under the circumstances stated in the charge would vest him with the title.

[4.] By virtue of the trust deed, the use and the right to the beneficial enjoyment of the property embraced in the deed was in the children of Mrs. Lucas after her death. Leaving out of view the question of the effect of the appointment of defendant's intestate by Edwards, if Daniels was the husband of one of the beneficiaries, for whom the property was held in trust, and had possession in right of his wife, he would be so connected with the title of the trustee, that he, or his representative in the event of his death pending the suit, might set it up in defense of his possession. The fact that the possession was obtained by

stealth or violence, from a wrongful possessor, would not destroy the right to set up such title. The court, therefore, did not err in its refusal to give the last charge asked by the appellant.

The judgment of the court below is affirmed.

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### WRIGHT vs. WRIGHT.

[BILL IN EQUITY BY PURCHASER FOR ABATEMENT OF PRICE.]

1. *When purchaser is entitled to abatement of price on account of deficiency in quantity of land.*—When the statements of the deed, as to the quantity of land conveyed, are mere matter of description, and there was no fraud on the part of the vendor, he is not bound to make good the deficiency, particularly if the sale was made in gross; and the purchaser, in such case, cannot claim an abatement of the purchase-money on account of the deficiency.
2. *Construction of deed as to clause containing statement of quantity.*—Where a deed, after describing the land conveyed partly by its numbers in the government surveys, and partly by metes and bounds, then added the words, “containing seven hundred and two acres, and the same being the settlement of lands at present occupied by said J. H.,” the vendor,—held, that these words were merely descriptive, and did not amount to a covenant as to quantity.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Mrs. Mary S. Wright and her husband, Joseph J. Wright, against John Wright. Its object was, to obtain an abatement of the purchase-money due from the complainants to the defendant, on an outstanding note which was given for a part of the price of a tract of land sold by the defendant to Mrs. Mary Wright. This relief was prayed on two grounds: 1st, that the defendant fraudulently misrepresented the southern boundary-line of the tract; and, 2d, that the land actually conveyed was deficient in quantity as compared



with the recitals of the deed. The contract was made on the 23d December, 1854. The price agreed to be paid was \$7,500, in gross. The recitals of the deed, as to the description of the land and its quantity, were as follows: "The south half of the north half of section 34; the north-east quarter of section 34; the south half of the south-east quarter of section 27, divided east and west; also, that part of section 26 bounded as follows: commencing at the south-west corner of said section, and running east on said line one-half mile, thence north to the Chewacla creek, to the line dividing sections 26 and 27, thence down said creek to the mouth of a large ditch, which is the line between the lands formerly owned by G. D. Smith and Edward Williams—the said lands all lying and being in township 17, range 24, and the same containing three hundred and eighty-two acres. Also the following: the north half of the north-west quarter of section 34; the east half of the west half of section 27, in township 17, range 24; and eight acres in the same township and range, adjoining the above, and described as follows: commencing at the north half-mile stake of section 27, running thence due south on the dividing line of said section, dividing it into east and west halves, three-fourths of the distance of said section, thence east to a certain ditch a little over a quarter of a mile from the dividing line, thence in a direction east of north, down the said ditch, to the Euphaupha creek, and thence along down said creek to the north line of said section—this, together with that first described, containing seven hundred and two acres, and the same being the settlement of lands at present occupied by said John Wright." The defendant answered, denying the charges of fraud and misrepresentation. There was no proof of fraud, but it was shown that the tract of land contained about twenty acres less than the amount stated in the deed.

On final hearing, on pleadings and proof, the chancellor held, that the statements of the deed, as to the quantity of land conveyed, were mere matter of description, and did not constitute a covenant or guaranty of quantity; citing to that point the following authorities: Powell v.

Clark, 5 Mass. 355; Stebbins v. Eddy, 4 Mason, 414; Butterfield v. Cooper, 6 Cowen, 481; Allison v. Allison, 1 Yerger, 161; and Meek v. Bowden, 5 Yerger, 467. He therefore refused to give any relief to the complainants on account of the deficiency in the quantity of land; and his decree on that point is here assigned as error.

GEO. W. GUNN, for the appellants, cited the following cases: Minge v. Smith, 1 Ala. 415; Bond v. Jackson, 3 Hayw. 189; Marshall v. Craig, 1 Bilb, 379; Hallett v. Wylie, 3 Johns. 44; Jackson v. Swart, 20 Johns. 85; Winslow v. Patten, 34 Maine, 25; Terrell v. Kirksey, 14 Ala. 209; Quesnell v. Woodliff, 6 Call. 218.

WILLIAMS & GRAHAM, *contra*, relied on the cases cited by the chancellor, with the following additional authorities: Dozier v. Duffee, 1 Ala. 320; Terrell v. Kirksey, 14 Ala. 209; 3 Paige, 94; 9 Paige, 168; Hilliard on Vendors, 309-11; Rawle on Covenants, 625; 650-90.

STONE, J.—While we are indisposed to unsettle the principles declared in Minge v. Smith, 1 Ala. 415, we acknowledge that, in our opinion, those principles should not be extended.—See Large v. Penn, 6 Serg. & R. 488; Allison v. Allison, 1 Yerg. 16; Snow v. Chapman, 1 Root, 528; Rawle on Cov. 520; Butterfield v. Cooper, 6 Cowen, 481; Keyton v. Branford, 5 Leigh, 39; Foley v. McKeown, 4 Leigh, 627; Harrison v. Talbot, 6 Dana, 258. See, also, the labored and learned collection of authorities in the opinion of the chancellor.

The assignments of error in this case question the correctness of the chancellor's construction of the clause in the deed relating to quantity. All the authorities agree, that if the statement of quantity be matter of description, the vendor, in the absence of fraud, is not bound to make good the deficiency, and the vendee is not required to surrender any excess. In sales made in gross, this rule is of more general application, than when the sale is made *per acre*.

In the case of Minge v. Smith, *supra*, this court attached

importance to the fact, that after each parcel of the land had been described according to the government surveys, the bond, *in a sentence entirely distinct*, contained the clause of quantity, in these words: "The whole of the within described lands contain in all twelve hundred and eighty-eight and seventy-one hundredths acres." The court, in another place, added, "The land, we have seen, was very fully described before the introduction of the clause we are examining, so that it cannot be held to be descriptive."

The clause in the present deed is entirely different. After describing the lands by numbers, and by metes and bounds, it proceeds: "This, together with that first described, containing seven hundred and two acres, and the same being the settlement of lands at present occupied by the said John Wright." Now, although the words which precede the statement of quantity may have furnished an accurate and complete description, still the parties did not rest on this. In continuation of the clause as to quantity, and as part of the same sentence, they superadded the clause, purely descriptive, that the same were *the settlement of lands at present occupied by the said John Wright*. We think this case distinguishable from *Minge v. Smith*.

If the lands conveyed had contained more than seven hundred and two acres, we apprehend no one would contend, that the vendor could claim payment for the excess; yet his claim in the supposed case would be equally meritorious with that which is set up in the present suit.

The decree of the chancellor, so far as the same is presented by the assignments of error, is affirmed.



## MOCK'S HEIRS vs. STEELE.

[BILL IN EQUITY FOR CORRECTION OF MISTAKES IN PROBATE DECREE.]

1. *Equitable relief against errors in probate decree.*—Under section 1915 of the Code, the distributees of an estate may obtain equitable relief against a decree of the probate court, wrongfully allowing to the administrator, on final settlement of his accounts, a credit to which he was not entitled, by alleging and proving that the administrator, for the purpose of preventing them from objecting to the allowance of the credit, represented to them that it was correct, and stated as facts circumstances which demonstrated its correctness; and that they, being ignorant of the facts, trusted to his representations, and forbore to object to the allowance of the credit.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the distributees and heirs-at-law of Benjamin N. Mock, deceased, together with the personal representatives of several deceased distributees, against David A. Steele, who had been the administrator of said Benjamin Mock; and sought to obtain equitable relief against a decree of the probate court of Lowndes, erroneously allowing to said Steele, on final settlement of his accounts as such administrator, a credit to which he was not entitled. The decree of the probate court was rendered on the 15th September, 1856; and the bill was filed on the 21st May, 1858. The error complained of in said decree consisted in the allowance to said administrator of a credit for \$1602 70, the amount paid by him, on the 18th February, 1856, to Mrs. Eliza Walker, the wife of one George Walker, as the owner of a judgment which Emanuel & Gaines had obtained in the county court of Lowndes, on the 10th February, 1841, against said Benjamin Mock, George Walker, and one Robert Lowe. The bill alleged, "that said David A. Steele, at said settlement, in order to prevent the parties interested therein from making any objection to said claim, represented to them that Mrs. Eliza Walker be-

came the owner of said judgment in 1850, as a part of her sole and separate estate, that said judgment was unsatisfied, and that Robert Lowe was insolvent;" that said Steele also stated, that, in view of these facts, he had paid Mrs. Walker one-half of the amount due on said judgment, as shown by her receipt which he offered as a voucher; that "under these representations, and having no other information relative to said claim than they derived from said Steele and the said voucher," complainants forbore to make any objection to the allowance of a credit for said payment, and the same was allowed by the court without objection; that after said settlement, complainants discovered, from the sheriff's return on an execution on said judgment, issued on the 28th May, 1851, that said judgment was satisfied on the 7th July, 1851, from a sale of property which the sheriff had levied on; that said judgment, at the time of the payment by Steele, was not a subsisting claim against said estate, and Mrs. Walker was not entitled to demand or receive on account thereof anything from said estate; and that these facts were known to said Steele at the time of said payment.

The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for appellants.

BAINES & NESMITH, *contra*.

A. J. WALKER, C. J.—The bill shows, that the defendant Steele, upon his settlement as administrator, for the purpose of inducing the complainants not to object to the allowance of a particular credit, represented the correctness of the credit, and stated circumstances out of which it grew, plainly demonstrating its correctness; that the complainants, who were ignorant upon the subject, upon those representations forbore to object; that the contrary of the representations was true, to such an extent as to destroy the right to the credit, and that the credit was allowed. These allegations make out a case for relief, (the bill being filed within two years after the

settlement in the probate court,) under section 1915 of the Code.

The error did not supervene in consequence of the fault or neglect of complainants. When a matter is equally open to the observation of both parties, or equally within the knowledge of both parties, it is a clear fault in one party to trust to the representations of the other, and he can not be heard to complain if misled by misrepresentations.—*Townsend & Milliken v. Cowles*, 31 Ala. 428. But, in this case, the party making the representations had peculiar opportunities of information, beyond the parties on the other side, who were totally uninformed upon the subject; and he, in effect, solicited their confidence, by making the representations with a view to obtain the forbearance of objections. They acted upon his representations, and reposed confidence in them. Can he now say, that it was a fault on their part to confide in him and in his representations? If he can, it would establish a principle, which would license the commission of fraud in every case where the deceived party could have ascertained the incorrectness of the representations upon which he acted. We hold, that the defendant Steele cannot say that the complainants committed a fault in trusting to his representations.

If the judgment, on account of the payment of which the credit was claimed, was paid by a sale of the property of George Walker, a co-maker with Steele's intestate, it would not give the wife of George Walker a claim to contribution. The right to contribution would belong to George Walker himself, and the claim could only be discharged by a payment to him.

The decree of the chancery court is reversed, and the cause remanded.

STONE, J., not sitting.



ENGLISH *vs.* WILSON.

[ACTION ON OPEN ACCOUNT FOR WORK AND LABOR DONE.]

1. *Examination of parties as witnesses.*—The plaintiff having been examined as a witness in his own behalf, (Code, § 2313,) the defendant cannot complain on error that the court rejected a portion of his testimony in reply, unless the record affirmatively shows that the portion rejected by the court was a denial of some fact sworn to by the plaintiff.
2. *When workman may recover on quantum meruit.*—If work is done under a special contract, but not in a workmanlike manner, and is nevertheless accepted and used by the employer, and is of any value to him, the workman is entitled to recover its reasonable value, not exceeding the price stipulated in the special contract.
3. *Recoupment of damages by employer.*—In an action to recover the value of work and labor done, the defendant is entitled, under the general issue, (Session Acts 1853-4 p. 60,) to recoup the damages caused by the workman's breach of contract in the performance of the work.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Joseph A. Wilson, against Mrs. Mary English, to recover the sum of \$170, alleged to be due from the defendant, for work and labor done by the plaintiff in adding two rooms to the defendant's dwelling-house. "On the trial," as the bill of exceptions states, "the plaintiff offered evidence tending to show, that he built two rooms as an addition to the defendant's house, and at her request; also, the value of said work, and that said rooms were accepted and used by defendant before the commencement of this suit. The evidence tended to show, also, that the gutter, built by plaintiff between the new rooms and the old part of the house, was badly constructed, and leaked very much; that the plastering and papering in the house below, by reason of the defect in said gutter, was greatly injured; that defendant, after plaintiff had quit said work, repeatedly complained of it, and sent for defendant to put it in order; and that he never did it. On cross examination of one of plaintiff's witnesses, defendant asked for plaintiff's declar-

ations; and the witness stated, in reply, that plaintiff told him, before commencing work on defendant's house, that defendant offered him \$110 to build said two rooms, and that he intended to accept the offer. The plaintiff, having given previous notice, appeared himself as a witness, and was cross-examined without objection. He testified, that he had performed work for the defendant, at her request, on other parts of the house, in no wise connected with said additional rooms; and proved the value of said work on other parts of the house. The foregoing evidence being before the jury, the defendant offered to recoup or set off the damages sustained by her from the leaking aforesaid, under the plea of *non-assumpsit*; but the court refused to allow the evidence, and the defendant excepted.

“Instead of putting the defendant on the stand, to controvert what the plaintiff had sworn, the parties agreed, that her answers to a garnishment, at the suit of one A. J. Warford, against plaintiff, should be used for that purpose, so far as it was legal and admissible. Said answer was in the words and figures following, to-wit: ‘Garnishee answers, that she is advised and believes that she is not indebted to said Joseph Wilson, in any amount whatever; but, if she does owe him anything, it is under the following contract: About the 1st of March, 1856, said Wilson contracted and agreed to do the following work, in three months, for the sum of \$110—that is to say: to tear down an old room and stair-steps, to build a new room, to put up a double pantry with a complete set of shelves, to cut a passage, and to put up a pair of stair-steps with banisters; and garnishee [was] to furnish the necessary lumber. Garnishee further says that she furnished the lumber, and complied in every respect with her part of said contract; that said Wilson only put up the little room, and did it in such a manner that garnishee was at considerable expense in repairing it; that he put up the steps without banisters, failed to ceil the passage, did not put up half of the shelves in the pantry, and joined the room to the main building in such a manner that it leaked very badly—indeed, so badly that other rooms in the house were

considerably damaged. Garnishee further answers, that he was working at her house some five or six months, and never did finish the work, although repeatedly requested to do so; that the work done by him was not done in a workmanlike manner; and that she does not know any one who has any goods, chattels or things in action belonging to said Wilson, or who is indebted to him.' On plaintiff's objection, the court refused to allow any portion of said answer, except such part as related to the subjects about which plaintiff had testified, to go to the jury, and especially that part of the answer which showed a special contract between the parties for the building of said two rooms, and a breach of the same; to which ruling of the court the defendant excepted.

"The defendant asked the court to charge the jury, that if the evidence showed a special contract, by which the plaintiff was to build said two rooms for \$110, the law implied that it was to be done in a workmanlike manner; and that, unless it was so done, the plaintiff committed a breach of his contract, and could not recover without showing that the breach was not his fault. This charge the court gave, but with this qualification: 'that if the evidence showed that, before suit, the defendant accepted said work of plaintiff, and used it, and it was of value, then plaintiff could recover what said work was reasonably worth, not to exceed \$110.' To the refusal of the charge as asked, and to the qualification given, the defendant excepted, and then requested the court to instruct the jury as follows: 'That if the work done by plaintiff was so connected with defendant's residence and dwelling, that she could not abandon it without abandoning her house and dwelling, then, though she accepted and used said rooms, she could set up said special contract and its breach, to bar a recovery in this case;' which charge the court refused to give, and the defendant excepted."

The several rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.



GEO. W. GAYLE, for appellant.

THOS. H. LEWIS, *contra*.

STONE, J.—There is not enough in this record to enable us to affirm that the circuit court erred, in rejecting as evidence the specified portions of Mrs. English's answer as garnishee. She had only the right to deny, "upon oath, the truth of the facts proposed to be sworn to by the plaintiff;" and as we are not informed that the portions of the answer rejected, were a denial of any fact *proposed to be sworn to by the plaintiff*, we must intend that the circuit court did not err in this particular.—See *Jordan v. Owen*, 27 Ala. 152.

[2.] Neither did the court err in the qualification which it gave to the charge, as given at the instance of defendant.—*Hawkins v. Gilbert*, 19 Ala. 54.

[3.] The trial was had on the plea of non-assumpsit. The court erred in rejecting evidence offered by defendant, as a basis of recoupment. The general issue permitted such defense.—*Pamphlet Acts of 1853-4*, p. 60; *Hatchett v. Gibson*, 13 Ala. 587; and other authorities on the brief of counsel; *Robertson v. Davenport & Patterson*, 27 Ala. 574.

Judgment of the circuit court reversed, and cause remanded.

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## WALKER vs. HUNTER.

### [MOTION TO DISMISS APPEAL.]

1. *Sufficiency of appeal bond as security for costs*.—A penal bond, conditioned that the appellant "shall prosecute his said appeal to effect, and shall satisfy such judgment as the supreme court shall render in the premises," is a sufficient security for the costs of the appeal, (Code, § 3041,) when the amount of the penalty is large enough to cover all the costs of the appeal, although the judgment or decree appealed from is one which cannot be superseded.

2. *Judicial notice of costs of appeal.*—The appellate court will take judicial notice of the amount of the costs of the appeal in each given case, and whether the penalty of the appeal bond is sufficient to cover all the costs.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JOHN GILL SHORTER.

THIS was a motion against the sheriff and his sureties, for his failure to make the money on an execution in favor of Mrs. Maria Walker, as executrix of John H. Walker, deceased, against Goodman & Mitchell. On the rulings of the court to the jury, the plaintiff was compelled to take a nonsuit, with a bill of exceptions. Instead of giving security for the costs of the appeal in the usual form, the appellant executed an appeal bond, in the penalty of one hundred dollars, conditioned as follows: "Now, if the above-bound Maria Walker shall prosecute her said appeal to effect, and shall satisfy such judgment as the supreme court shall render in the premises, then this bond to be void," &c. On these facts, the appellees' counsel submitted a motion to dismiss the appeal.

WM. P. CHILTON, and L. E. PARSONS, for the motion.

S. F. RICE, and J. FALKNER, *contra*.

STONE, J.—Motion is made to dismiss the appeal in this case, because, as it is contended, the judgment of the circuit court, from which the appeal is prosecuted, is not such a judgment as may be superseded under section 3019 of the Code; and, in the second place, it is urged that the bond found in this record is not sufficiently comprehensive to operate as security for the costs under section 3041 of the Code.

If the bond found in this record is a good and sufficient security for costs, it is not important in this motion to inquire whether the judgment is one which may be superseded; such security for costs will uphold the appeal.

If this question were an open one in this court, and if it be conceded that the judgment in the court below is not of any class which may be superseded under our statutes, it may admit of grave question whether the present

appeal bond does secure all the costs for which the appellant may become liable. We do not, however, regard the question as an open one.

In the case of *Williams v. McConico*, 27 Ala. 572, motion was made to dismiss the appeal. The bond in that case did not assume to supersede the judgment; nor are we aware that any statute of ours authorized that judgment to be superseded. The report of that case does not set out the appeal bond; but we have examined the record, and find that its penalty was one hundred dollars, with condition in the following language: "Now, if she shall prosecute her appeal, or, failing therein, shall pay all such costs as may be occasioned by said appeal, then the above bond to be void." It is manifest this bond secured the costs, only in the event the appellant failed in her appeal. The motion to dismiss was overruled. This court, among other things, said: "In relation to the objections which have been urged against the appeal bond, it is only necessary to say, that under the law regulating this appeal, (Code, § 1898,) security for the costs only was required. \* \* \* Here, the obligation is to pay the costs of the appeal."

In *Satterwhite v. The State*, 28 Ala. 65, the bond was in condition to prosecute the appeal to effect, and to pay and satisfy the judgment which the supreme court may render. We held this a sufficient security for costs.

In the present record, the obligation is to prosecute the appeal to effect, and to *satisfy such judgment as the supreme court shall render*. This is, in substance, precisely the same as the appeal bond in *Satterwhite's* case, *supra*.

The bond in the case of *Williams v. McConico*, in *Satterwhite's* case, and in this case, each fails to secure some possible liability which may fall on the appellant; while each is a security for all the costs which this court can adjudge against him. We will adhere to the principle of the two cases cited.

The profession, in accommodating their practice to this opinion, should bear in mind that the costs in appeals to this court are not uniformly the same. The amount depends much on the size of the record. In each given



case, we judicially know the amount of the costs; and should the penalty be insufficient to secure the entire costs, the appeal bond would, on motion, be pronounced defective.

The result of what we have said is, that whenever the bond is in sufficient penalty to cover the costs of the appeal, and in condition to pay such costs as this court may render against the appellant, such bond is a security for the costs, and will uphold the appeal.

The motion to dismiss the appeal is overruled.

A. J. WALKER, C. J., not sitting.

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## GALLIARD vs. DUBOSE & CO.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Amendment on error, after judgment by default, of insufficient description of parties' names in complaint.*—After judgment by default, in an action by a partnership, the failure to state the individual names of the partners in the complaint, when they are fully stated in the accompanying summons, is an error which, being amendable in the primary court, will be considered amended on error.—Code, § 2404.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THE record in this case shows, that the defendant, Edmund Gaillard, was summoned "to answer the complaint of Isaac C. Dubose and Emanuel Jones, merchants and co-partners, trading under the name and style of I. C. Dubose & Co." The complaint was in the name of I. C. Dubose & Co., and did not state the individual names of the partners composing the firm. The judgment was by default, and the plaintiffs' damages were assessed under a writ of inquiry. The rendition of the judgment by default is assigned as error.

D. W. BAINE, for the appellant, cited *Reid & Co. v. McLeod*, 20 Ala. 576.

R. C. TORREY, *contra*.

STONE, J.—Although the complaint in this case is filed in the name of I. C. Dubose & Co., the names of the parties plaintiff are fully set out in the summons which accompanied it. This error was amendable in the court below, while the suit was in progress, and, after judgment, must be considered as amended.—Code, § 2404.

Judgment affirmed.

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### SMITH *vs.* ASHURST AND WIFE.

[PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *When legatees take per capita*.—Under a residuary bequest to “my niece, Frances Ellen Johnson, and the children of my brother Richard,” the legatees take *per capita*, and not *per stirpes*.
2. *Who take as “children.”*—Under a residuary bequest to “the children of my brother Richard,” children born after the testator's death take nothing.

### APPEAL from the Probate Court of Tallapoosa.

IN the matter of the partial distribution of the estate of Thomas W. Coker, deceased, whose last will and testament had been duly admitted to probate in said county, and contained the following residuary clause: “Lastly, it is my will that the residue of my estate, both real and personal, be converted into cash, as my executors can do so to the interest of the legatees, and the whole amount be equally divided, *pro rata*, between my niece, Frances Ellen Johnson, and the children of my brother, Richard C. Coker.” Under this clause of the will, the probate judge ruled, that the legatees took “by classes”—that is, that Frances Ellen Johnson (now Mrs. Ashurst) took one moiety, and the children of Richard C. Coker the other

moiety; and further, that Charlotte Coker and Richard Coker, children of said Richard C. Coker, who were born after the death of the testator, took nothing. These two rulings of the probate court are now assigned as error.

GEO. W. GUNN, for appellants, cited the following cases:

1. That the testator intended his niece Frances Ellen and the children of his brother Richard to take *per capita*. Duffee v. Buchanan, 8 Ala. 27; Walker v. Moore, 1 Beavan, 608; *Ex parte* Leitch, 1 Hill's Ch. 153; Blackler v. Webb, 2 P. Wms. 383; 2 Jarman on Wills, 80-81.

2. That the children of Richard C. Coker, born after the testator's death, took equally with the others under the residuary clause—Jenkins v. Freyer, 4 Paige, 47; Cole v. Creyon, 1 Hill's Ch. 322; Ellison v. Avery, 1 Vesey, sr. 11; 2 Jarman on Wills, 54-5, and note; 2 Williams on Executors, 718, and authorities there cited.

WM. H. BARNES, *contra*, cited the following authorities:

1. To the first point above stated: Walker v. Griffin, 11 Wheaton, 375; Jourdan v. Green, 1 Dev. Ch. 270; Cole v. Creyon, 1 Hill's Ch. 319; Alder v. Beal, 11 Gill & John. 123; Roome v. Counter, 1 Halsted, 111.

2. To the second point: Devisme v. Mells, 1 Bro. C. C. 537; Andrews v. Partington, 3 Bro. Ch. Cases, 401; 5 Paige, 172.

STONE, J.—Mr. Jarman, in his admirable work on Wills, (vol. 2, p. 111,) says: "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take *per capita*, and not *per stirpes*."

The same rule applies where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to "my brother A., and the children of my brother B.," in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his mind. And of course it is



immaterial that the object of the gift are the testator's children and grandchildren: as where a legacy was bequeathed "equally between my son David, and the children of my son Robert."

The principle stated above is well sustained by authorities, and must be regarded as the general rule.—See *Blackler v. Webb*, 2 Pr. Williams, 383; *Jourdan v. Green*, 1 Dev. Eq. 270; *Duffee v. Buchanan*, 8 Ala. 27; *Vanzant v. Morris*, 25 Ala. 285; *Ex parte Leitch*, 1 Hill's Ch. 152.

The case of *Howard v. Howard*, 30 Ala. 391, is decided on the principle stated above.

This mode of construction will yield to a very faint glimpse of a different intention in the context.—2 Jarman, side page 111. If, however, the context gives no evidence of a different intention, the general rule stated above must prevail.

We have carefully considered the provisions of this will, and can find no authority for taking this out of the general rule. On the contrary, we think the will, considered in its various devises and bequests, furnishes strong persuasive evidence that Frances Ellen Johnson and the children of Richard Coker should take, under the residuary clause, *equally* and *per capita*..

[2.] We concur with the probate court in holding that the children of Richard Coker, born after the death of the testator, take nothing under this will.—*Jourdan v. Green*, 1 Dev. Eq. 270, and authorities on brief; 2 Jar. on Wills, side pages 74–5; *Vanzant v. Morris*, *supra*.

For the error in dividing the residuary bequest *per stirpes*, and not *per capita*, the judgment of the probate court is reversed, and the cause remanded.

# REPORTS

OF

## CASES ARGUED AND DETERMINED

At June Term, 1859.

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### NONEMAKER *vs.* THE STATE.

[INDICTMENT FOR GAMING.]

1. *Waiver of objection to plea.*—In a criminal case, if issue is joined on a plea and a trial is had thereon, without objection on the part of the State, the appellate court will not, at the instance of the State, treat such plea as a nullity.
2. *Plea of former conviction.*—Under the plea of former conviction in a gaming case, if the record of the former conviction, and the parol evidence adduced in aid of it, fail to show conclusively the non-identity of the two cases, the court is not authorized to instruct the jury, that if they believe the evidence, they must find the prisoner guilty.

FROM the Circuit Court of Perry.

Tried before the Hon. A. A. COLEMAN.

THE indictment in this case was found at the fall term, 1857, of said circuit court, and charged the prisoner, in several different counts, with playing “at a game with cards, or dice, or some device or substitute therefor,” at each of the public places enumerated in the statute. The trial was had at the spring term, 1859, on the pleas of not guilty and former conviction. “On the trial,” as the bill of exceptions states, “the State introduced a witness

who proved, that the defendant and one — played together at a game with cards, within twelve months before the finding of the indictment, in a public shoemaker's shop, in Union Town in said county." Under the plea of former conviction, the defendant then offered in evidence the record of his conviction, at the last previous term of said court, on the plea of guilty, under an indictment which was in precisely the same words as that in the present case, and which was found at the same term of the court. "A witness was then introduced, who was examined as to whether this was the same offense for which a conviction was had at the last term; and testified, that he was not examined as a witness on said trial, nor was any one else examined,—the defendant having pleaded guilty, and submitted to a fine of \$20; also, that he was not a witness before the grand jury; that he supposed the game for which the defendant was indicted and convicted as aforesaid, was a game in which defendant, witness and one — were engaged; that the three were indicted, and defendant and witness pleaded guilty. Said witness further testified to a game of cards played by defendant and one — at the same place, subsequently to the game played by the three as aforesaid,—said game between the two being the same game about which the State had introduced the testimony hereinabove mentioned. This being all the evidence in the cause, the court charged the jury, that if they believed the evidence, they must find the defendant guilty; to which charge the defendant excepted."

P. LOCKETT, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The State neither moved to strike out, nor demurred to the plea of former conviction, nor in any other manner objected to it in the court below. The record informs us that the defendant pleaded to the indictment the pleas of not guilty and of former conviction, and the trial was evidently had upon both pleas. It would be neither a fair nor a just practice, for the court,



at the instance of the State, on appeal, to treat the plea of former conviction as a nullity. If the State had made the objection in the court below, the defendant might have remedied it. To allow it to be made here, after the plea has been treated in the circuit court as sufficient, would operate as a snare for the defendant.

[2.] Whether the offense for which the accused was prosecuted in this case was the same for which he had been previously convicted, was not conclusively determined by the record. It was a question as to which parol evidence was admissible, and was received. The record and parol evidence, when considered together, do not so conclusively show that the offense for which there had been a former conviction was not the same with that which the State prosecuted in this case, as to authorize the charge that the jury must, upon the evidence, find for the State.

Judgment reversed, and cause remanded.

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## BARBER vs. THE STATE.

[INDICTMENT FOR RECEIVING OR CONCEALING STOLEN PROPERTY.]

1. *Punishment for concealing or receiving stolen horse.*—Construing sections 3178 and 3182 of the Code together, a conviction may be had under the former section for concealing, or aiding to conceal, a horse, mare, or other animal specified in the latter section, knowing the same to have been stolen,—the intent to injure or defraud being found; but a conviction for buying or receiving a stolen horse, mare, &c., knowing the same to have been stolen, can only be had under the latter section. The punishment of the former offense, as prescribed by section 3178, is imprisonment in the penitentiary, for not less than two, nor more than five years; of the latter, as prescribed by section 3182, imprisonment in the penitentiary, for not less than three, nor more than seven years.
2. *Misjoinder of offenses in indictment.*—Concealing, or aiding to conceal, a stolen horse or mare, knowing the same to have been stolen; and buying, or receiving, a stolen horse or mare, knowing the same to have been stolen,—being offenses which, though of the same character, are not subject to the same punishment, cannot be charged disjunctively in the same count.

FROM the Circuit Court of St. Clair.

Tried before the Hon. WILLIAM S. MUDD.

THE indictment in this case contained but a single count, and charged that the defendants, Gray Barber and Champ Barber, "before the finding of this indictment, bought, received, concealed, or aided in the concealment of, a certain sorrel mare, the personal property of Israel Cottle, knowing such personal property to have been stolen, with the intent to injure or defraud; against the peace and dignity," &c. After conviction, the defendants moved in arrest of judgment, on the following grounds: "1st, because said judgment was rendered on an indictment insufficient in law; 2d, because said indictment charges no offense known to the law; and, 3d, because said indictment is bad for uncertainty." The court overruled the motion in arrest, and sentenced one of the defendants to two years imprisonment in the penitentiary, having granted a new trial as to the other. An exception was reserved by the defendants to the overruling of the motion in arrest of judgment.

JAS. B. MARTIN, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—Section 3182 of the Code declares, that "any person who receives or buys any horse, mare, gelding, foal, filly, ass or mule, that has been feloniously taken or stolen, knowing that the same has been so taken or stolen," must, on conviction, be imprisoned in the penitentiary, not less than three, nor more than seven years. Code, § 3180.

By section 3178, it is provided that "any person who buys, receives, conceals, or aids in the concealment of any personal property other than slaves, or deed, conveyance, or other writing specified in section 3176, knowing such personal property to have been stolen, or such deed, conveyance or writing to have been taken with the intention to injure or defraud, must, on conviction, be imprisoned in the penitentiary, for not less than two, nor more than

five years." The writings specified in section 3176, are *deeds, conveyances of lands, and of personal property*, belonging to another.

While it must be conceded that a *horse, mule, &c.* are "personal property," and comprehended in the generic term employed in section 3178; still, they are the express subjects of the greater offense, denounced in section 3182 of the Code. It can not be supposed, that for buying or receiving a horse, mare, &c., knowing that such horse or mare had been stolen, the legislature intended, by section 3178, to imprison the offender from two to five years in the penitentiary; and for the same offense, under section 3182, to imprison him from three to seven years in the same prison.

Section 3182 makes no provision for the offense of concealing, or aiding in the concealment of a horse, mare, &c., that has been stolen. Section 3178 does declare a punishment for concealing, and for aiding in the concealment of personal property, known to have been stolen. Horses and mares being personal property, and there being no express provision of the statute covering that offense when committed in reference to this species of property, it follows that, for concealing, or aiding in the concealment of the different species of personal property enumerated in section 3182, known to have been stolen, a conviction may be had under section 3178, if the intention to injure or defraud be found, as provided by that section.—See *Nabors v. The State*, 6 Ala. 200. For buying or receiving a horse, mare, &c., knowing such horse or mare to have been stolen, a conviction can not be had under section 3178 of the Code.—*Williams v. The State*, 15 Ala. 259; *Ham v. The State*, 17 Ala. 188; *Murray v. The State*, 18 Ala. 727.

We have, then, the case of offenses of the same character, but not subject to the same punishment, charged in the same count in the alternative. The statute does not permit this.—Code, § 3506. The offense of buying or receiving a horse, mare, &c., knowing such horse or mare to have been stolen or taken, must be proceeded against under section 3182 of the Code. For concealing,



or aiding in the concealment of such stolen property, the indictment must be framed under section 3178 of the Code.

It results from what we have said, that the circuit court ought to have arrested the judgment of conviction in this case; and for that error, the judgment is reversed, and the cause remanded. Let the prisoner remain in custody, to answer another indictment to be preferred in accordance with this opinion, or until otherwise legally discharged.

### DORMAN *vs.* THE STATE.

[INDICTMENT UNDER SPECIAL STATUTE FOR SELLING SPIRITUOUS LIQUORS.]

1. *Constitutionality of prohibitory liquor law.*—The fourth section of the act “to incorporate the Southern University of Greensboro,” (Session Acts of 1855–6, p. 221,) which prohibits the sale of any kind of spirituous or intoxicating liquors within five miles of Greensboro, is not violative of any constitutional provision, State or Federal.
2. *Form and sufficiency of indictment.*—In an indictment under this statute, the name of the person to whom the liquor was sold must be specified, or the person be otherwise described: section 1059 of the Code does not apply to such a case.

FROM the Circuit Court of Greene.

Tried before the Hon. WM. M. BROOKS.

THE indictment in this case was found at the fall term of said circuit court, 1857, and was in these words:

“The grand jury of said county charge, that before the finding of this indictment, Amasa M. Dorman, not a druggist keeping a regular drug-store, or practicing physician, sold, exchanged, or bartered away for money, or other consideration of value, or for the promise or expectation thereof, within the corporate limits of the town of Greensboro, or within five miles of said corporate limits, brandy, gin, wine, beer, ale, porter, or other intoxicating

drinks, against the peace and dignity of the State of Alabama."

The defendant demurred to the indictment, on the following specified grounds: "1st, because it does not state that the alleged offense was committed after the first day of March, 1857; 2d, because it does not charge any offense punishable by the laws of this State; 3d, because it does not state to whom the alleged selling was made, or whether it was made to any legal person, or to any person at all; 4th, because it is uncertain and insufficient; 5th, because the act of the legislature under which said indictment is framed—that is, the fourth section of said act—is unconstitutional and void; and, 6th, because said section of said act is in conflict with the constitution and laws of the United States."

The overruling of the demurrer to the indictment, with other matters which require no special notice, is now assigned as error.

E. W. PECK, for the defendant.—1. The indictment is insufficient in several particulars. The offense charged being purely statutory, the indictment must be framed in reference to the statute, and must conform to either its letters or its substance.—*Skains and Lewis v. The State*, 21 Ala. 223, and authorities there cited. The statute prohibits the sale, within certain specified limits, of "any brandy, gin, or other spirituous liquors, any wine, beer, ale, porter, or intoxicating beverages, simple or compound, in any quantities, large or small, to any person or persons whatever;" while the charge in the indictment is, that the defendant sold "brandy, gin, wine, beer, ale, porter, or other intoxicating drinks,"—which is not according to the letter or substance of the act. The indictment also fails to specify the name of the person to whom the alleged sale was made, or to allege that it was made to any person whatever; and in this particular it is fatally defective.—*Francois v. The State*, 20 Ala. 84; *Brown v. Mayor of Mobile*, 23 Ala. 722. The form of indictment prescribed by the Code is not applicable to such cases as this.—*Camp v. The State*, 27 Ala. 53.

2. The act under which the indictment was found, is void, because it is in violation of the State constitution. Written constitutions, and solemn declarations of rights, are not necessary, nor are they intended, to protect majorities, but to control and restrain them—to declare and defend the rights of minorities and individuals, and to protect them against the powers and encroachments of majorities. These purposes can only be accomplished by a firm, vigorous and fearless administration on the part of courts of justice, based upon a large and liberal construction of the language used, especially when employed, as in our bill of rights, with reference to the protection of the life, liberty and property of the people; and, for that purpose, to limit and restrain the legislative powers of the government.—3 Kernan, 398; 5 Paige, 145. In the preamble to our constitution the people say, that it was ordained in order to establish justice, insure tranquillity, provide for the common defense, promote the general welfare, and insure to themselves and their posterity the rights of life, liberty and property. In order to protect themselves the more surely against the powers and encroachment of the government which they were about to establish, and to secure, so far as human prudence and foresight could, a recognition of the great and essential principles of liberty and free government, it was declared by the first article of the constitution, commonly called “the bill of rights,” that all freemen, when they form a social compact, are equal in rights; that no men, or set of men, are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services; that no one shall be deprived of life, liberty or property, “but by due course of law;” and, as if to exclude any inference which might be drawn from the enumeration of certain rights, that such rights were the only ones intended to be thereby secured, the 30th section of that article declares, that such enumeration shall not be construed to disparage other rights retained by the people; and further, to guard against any encroachments of any of the high powers therein delegated, that everything in that article is excepted out of the general powers of the



government, and should forever remain inviolate, and that all laws contrary thereto should be void.

It thus appears, that the legislative power of the State is a limited power; that there are certain things which it cannot do. It cannot deprive a citizen of life, liberty or property: that can only be done "by due course of law." Nor can it destroy that general equality of rights, which, it is declared, all freemen possess when they form a social compact, unless the power to do so be expressly given, or arise by clear implication. Every citizen has the right to pursue any lawful vocation or business which may be pursued by any other citizen of the State. The legislature may prescribe qualifications, to be possessed before any business can be pursued; but such qualification must be attainable by all. In other words, the legislature may regulate any lawful business or pursuit, but cannot prohibit the same.—*In re Dorsey*, 7 Porter, 293, 360-62; 20 Barbour, 216-17.

If, then, a citizen cannot be deprived of life, liberty or property, but by due course of law; and if brandy, gin, and other spirituous liquors, wine, beer, ale and porter, be property, it follows that they are under the protection of the constitution, and that a citizen cannot be deprived of them but by due course of law. Are they property? The act itself recognizes them as property, in authorizing certain privileged persons to sell them for certain specified purposes. The laws of the State recognize them as property, in providing for the granting of licenses to sell them. The constitution of the United States recognizes them as property, in the power given to congress to regulate commerce with foreign nations and among the several States; and the several acts of congress made under that power, levying a duty upon the importation, and thereby authorizing them to be sold, recognize them as property. In *Pierce v. New Hampshire*, known as one of the "license cases," (5 Howard's U. S. R. 577,) Taney, C. J., says: "Spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and transfer, like any other commodity in which a right of property exists." There

is no definition of property which does not apply to these articles. They have been separated from the common stock of nature, for private use. They are things over which a man may exercise absolute dominion, to the exclusion of every other person. Some of them are regarded as articles of diet, all as articles of trade and commerce: they are bought and sold, acquired and lost, like other property. In every sense of the term, therefore, they are property, endowed with the same rights, and subject to the same measure of control as other property, and no more.—People v. Toynebeck, 20 Barbour, 192. The right of property, which right consists in the free use, enjoyment, and *disposal of it*, without any control or diminution, save only by the laws of the land, is one of the absolute rights inherent in every freeman.—1 Bla. Com. 138. The absolute rights of individuals are, the rights of personal security, the right of personal liberty, and the right to acquire and enjoy property.—2 Kent's Com. 1. There can be no property, in the legal or popular sense of the term, where neither the owner nor the person representing him has the power of sale and disposition. That which cannot be used, enjoyed and sold, is not property.

These articles, then, being property, the owner cannot be deprived of them, "but by due course of law." What is the meaning of these words, as used in the constitution? The terms, "the law of the land," "due process of law," and "due course of law," whether found in the English charters and statutes, or in our American constitutions, have the same meaning. Lord Coke says, that "by the law of the land" means, "by due course and process of law, by indictment, or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law."—In Hoke v. Henderson, 4 Dev. Rep. 1, it is said, that the words "due process of law" cannot mean less than a prosecution or suit instituted and conducted according to the forms and solemnities for ascertaining guilt, or determining the right to property. In Westervelt v. Gregg, 2 Kernan, 209, it is said: "Due process of law undoubtedly means, in the due

course of legal proceedings, according to those rules and forms which have been established for the protection of private rights: such an act as the legislature, in the uncontrolled exercise of its power, may think fit to pass, is, in no sense, the process of law designated in the constitution." In *People v. Toynbeck*, 20 Barbour, 198, quoting from *Hoke v. Henderson*, *supra*, it is said, that the law of the land, as the term is used in the bill of rights, "does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority." These authorities, with many others which might be referred to, conclusively show that "due process of law," as used in the bill of rights, does not mean merely an act of the legislature.

What, in legal contemplation, amounts to the depriving of a person of his property? It is not necessary for that purpose that his property should be forcibly taken from him, nor that the *corpus* of the property should be destroyed. The right of property, as above shown, consists in the free use, enjoyment, and disposal of it. These are the incidents and attributes of property. There can be no property, in the legal sense of the term, where the owner has not the power of sale and disposition. That which cannot be used, enjoyed and sold, is not property; and to take away any of these incidents or attributes, is, in legal contemplation and effect, to deprive the owner of his right of property.—20 Barbour, 195. The exclusive right of using and transferring property follows, as a natural consequence, from the perception and admission of the right itself.—2 Kent, 320. There is nothing which so generally strikes the imagination, and engages the affection of mankind, as the rights of property; that safe and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. 2 Bla. Com. 2. The right of property extends not only to its *corpus*, but to all of its essential characteristics; one of which characteristics is the free right to sell and dispose of it, not for some special and limited purpose or use only, but for all the ordinary uses and purposes for which



it was designed, and without which it would be of little or no use. What is the especial purpose for which wine, beer, ale and porter are chiefly made? Is it not that they may be used as a beverage or diet by all who desire so to use them, and who are able to procure them? and are they not so used, in fact, by a large portion of the people in all the world? And for this purpose they must necessarily be bought and sold, as well as made. What would become of the Frenchman or Italian without his wine? the German without his beer? the Englishman without his ale or porter? Who would be the greatest sufferers by their destruction? not the rich and noble only, but the common people, the laboring classes.

That the act under consideration takes away some of the incidents of property from the articles enumerated in it, within the limits of the territory named, and therefore deprives the owner of his rights of property in them, is too plain for argument. Its manifest object and intent is to do that very thing, and its enforcement, if it be held valid, will accomplish that object and intent. It declares, that the specified articles shall not be sold, exchanged, or bartered away, for money or other consideration of value, or for the promise or expectation thereof, in any quantities whatever, to any person or persons whatever, unless the persons selling be druggists, keeping a regular drug-store, or practicing physicians; and by them the sale must be made in good faith, for medicinal purposes only. The fact that the operation of the act is limited to the corporate limits of the town of Greensboro, and the circumjacent territory within five miles thereof in every direction, does not relieve the act of this objection. Conceding that the legislature may prohibit the sale of these, or of any or all other articles, within the *immediate precincts* of court-houses, churches, colleges, or schools, no legitimate argument can be drawn from the concession in favor of the validity of this act, which covers a territory of more than one hundred square miles, including an entire town of no inconsiderable importance. If such a prohibition can be sustained, every city and town in the State may be environed by like prohibi-

tions; and thus, to every practical effect, the sale of these articles, and of any other articles which may happen at any time to become obnoxious to the legislature, may be prohibited over the whole State; for the cities and towns are, substantially, the only markets, not only for these, but for all other articles of trade and commerce. To exclude them from the towns and cities, is to drive them out of the State—to take from them the incidents of property, and thus effectually deprive the owner of his right of property in them.

The act also violates the first section of the bill of rights. It destroys that general equality of rights, which, it is declared, all freemen possess when they form a social compact. This section was intended to guaranty to every citizen, not only the same right to aspire to every office, but the same right to pursue any vocation or business which might be pursued by any other citizen.—7 Porter, 360. This act takes away from every citizen, residing within the territory embraced by its provisions, the right to pursue a business which, independent of the act, is perfectly lawful. To declare a certain employment or business unlawful within a certain portion of the State, is to prohibit the people who live within the proscribed part of it from engaging in the business; and to say that they may engage in the business if they will abandon their homes, instead of answering or removing the objection, makes the act more odious.

3. The act is void, also, because it conflicts with the constitution of the United States, which gives congress the exclusive power to regulate commerce with foreign nations, and among the several States; and with the several laws of congress, passed in pursuance of that power, which levy duties on the importation of the articles specified in the act, and thereby authorize them to be sold. The object of importation is to sell the articles imported; the right to sell them constitutes the consideration for the payment of the duties; and the importer, by the payment of the duties, purchases this right.—Brown v. Maryland, 12 Wheaton, 442–47. This right in the importer, it is true, is limited to a right to sell the merchandise

in the form in which it is imported; that is, by the cask or package, and not by retail or otherwise. Does not this right of the importer to sell imply a corresponding right in the merchant thus to buy? and does not this right of the merchant necessarily carry with it the right to sell to the consumer? Commerce could not be carried on without the existence of these corresponding rights in the importer, the merchant, and the consumer. After merchandise has passed by sale out of the hands of the importer, or has been by him otherwise mixed with the general property of the country, then, and not till then, does the jurisdiction of the State over it attach, and its sale may afterwards be regulated by State laws; but the power of the State ends with regulation, and does not extend to prohibition.—12 Wheaton, 442–47; 20 Barbour, 216–17. “If the reasoning the chief-justice” (in *Brown v. Maryland*, *supra*,) “is entitled to any weight as authority, it is decisive of the question, so far as sales of foreign liquors by importers is concerned. The right of importation, we see, means the right to introduce foreign goods into the country, and to sell them to those who may choose to become purchasers. If State legislation can substantially take away from the mass of its citizens the power to become purchasers, a State can, in effect, impede foreign trade, and put an end to foreign importations.”—20 Barbour, 203. If the reasoning of these decisions be correct, the act under consideration cannot stand. It is absolutely prohibitory within the territory covered by it, and its limitation within specified boundaries does not remove the objection. The constitution and laws of the United States embrace the entire territory of every State, and are not confined to the ports of entry, or the borders of the States. The power of congress to regulate commerce, says Marshall, C. J., “is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.”—12 Wheaton, 446.

S. F. HALE, with whom were M. A. BALDWIN, Attorney-General, and JAS. D. WEBB, *contra*.—The argument



against the constitutionality of the act under which the indictment in this case was found, renders it necessary to inquire into the powers of the government. The preamble to the constitution informs us, that the objects for which the government was formed, were "to establish justice, insure tranquillity, provide for the common defense, promote the general welfare, and secure the rights of life, liberty and property" to its founders and their posterity. All these objects, then, are within the scope of governmental care and protection. In order to effectuate these purposes, the people, in convention assembled, divided all the powers of the government, by the 1st section of the 2d article of the constitution, into three departments—the legislative, the executive, and the judicial; by the 1st section of the 3d article, vested the whole legislative power of the government in the senate and house of representatives; and specially enjoined it upon the government, by one of the general provisions of the constitution, that "schools and the means of education shall be forever encouraged in this State." Here, then, is a government created with sovereign and plenary powers, with a special injunction to encourage the means of education; and the only limitations on its powers, supposed to be pertinent to this case, are the last clause of the first section of the bill of rights, the 10th section, the last clause of the 13th section, and the third clause of the 8th section of the first article of the constitution of the United States. On behalf of the State, the following propositions are submitted, which, it is insisted, are true in principle, are sustained by authority, and conclusively establish the validity of the act under consideration.

1. All the legislative power of the State is vested in the senate and house of representatives. The general assembly may exercise all such legislative powers as are not incompatible with the social compact, or prohibited by express constitutional provision. Education and morals are proper subjects of legislative protection, as well as life, liberty, or property. The legislative department of the government is the exclusive judge of all questions involving the policy, expediency, or necessity of legislation;

and no court can or ought to declare a law unconstitutional in cases of doubt, but only in cases where the law is clearly in violation of the provisions of that instrument. On these points see 24 Ala. 614; 1 Ala. 620; 12 Ala. 418; 3 Ala. 143; 21 Ala. 614; 17 Penn. 128; 16 Geo. 102; 3 Gibbs, 348, 403; 3 Kernan, 476-85.

2. The legislature has the power to prescribe the terms on which her citizens may engage in a given employment; and so long as the terms are uniform in reference to all her citizens, no exclusive emoluments or privileges, within the meaning of the constitution, are granted. 7 Porter, 361; 3 Ala. 137. It is conceded, that spirituous liquors are property; and that the free use, enjoyment, and right of sale, are among the ordinary incidents of property; but it is denied that the regulation, restraint, or even destruction of one of these incidents, is depriving a man of his property, within the meaning of the constitutional prohibition. It is insisted, on the contrary, that every government, claiming the attributes of sovereignty, has the power to regulate and restrain its citizens in the use and disposition of their property. The right of the owner to use or sell property, independent of the control of the government, has never existed since the institution of society, but is a right which was necessarily surrendered by him when he entered into the social compact. The act under consideration claims nothing more than to regulate and restrain the citizen in the use of his property. *Shelton v. Mayor of Mobile*, 30 Ala. 540; *Chandler v. Intendant of Marion*, 6 Ala. 899; *Mayor of Mobile v. Yuille*, 3 Ala. 137; 3 Gibbs, 330-42; 1 Gray, 27, and other cases in the same volume, where convictions were had under the same statute; 37 Maine, 161; 33 Maine, 559; 10 Foster, N. H. 229; 14 Ill. 196; 7 Cow. 605; 11 Met. 57; 7 Cushing, 85; 3 Rhode Island R. 68, 293; 3 Kernan, 378, *et seq.*, opinions of A. S. Johnson, L. A. Johnson, Selden, Mitchell, and Wright, JJ.; 5 English, 259; 8 Barr, 321; 12 Maine, 403; 15 Illinois, 588; 25 Conn. 290; 27 Vermont, 328.

3. The protection of property is not the only object of government. It has like power, and it is made its duty,

to protect the lives, liberty, health, and morals of its citizens, and to provide for their education. All these are proper subjects of legislation; and it is one of the highest duties of the legislative power to determine how far one of these interests must be restrained, in order to advance another, and for the general welfare of society.—See authorities above cited. It has always been the policy of this State, as shown by successive enactments at nearly every session of the legislature, to regulate, restrain and control the traffic in spirituous liquors, and to permit them to be sold only in certain quantities, and under certain circumstances; and it involves the exercise of no more power to prohibit their sale at certain places, than to say they shall not be sold in certain quantities.—6 Ala. 899, *supra*.

4. The argument, that if this act be declared constitutional, the legislature may pass similar acts, until the area of the whole State is covered by them, though plausible, is not sound. If such legislation would be unconstitutional, the court is bound to presume that the legislature will never attempt it; for one department of the government can never indulge the presumption that another will transcend its legitimate powers. As well might the court hold the law forbidding the transaction of worldly business on Sunday to be unconstitutional, on the ground that the legislature might, in like manner, declare it unlawful to engage in worldly business on each of the other days of the week. The same argument was made against the constitutionality of the statute prohibiting the carrying of concealed weapons, and was overruled.—*The State v. Reid*, 1 Ala. 612.

5. The act under consideration shows, on its face, that the legislature did not intend to pass a general prohibitory law. It is equally clear that they did not in fact do so. It is equally clear that they have deprived no man of his property, and never intended to deprive any man of his property; and that all they have done, or intended to do, is to prohibit the citizens of the State from carrying on a certain trade at a certain place, except under certain conditions and restrictions. This is done by



every well-organized government in all countries, as is shown by the authorities above cited.

6. The power to take private property for public uses, is one asserted by every government, by virtue of its right of eminent domain. But that is a totally different power, and depends upon different principles from the right to regulate the use of property, which right is asserted by every government by virtue of its inherent power to adopt its own internal police regulations. The act under consideration does not take private property for public uses, nor for any other uses, but only regulates the use of private property. Consequently, the last clause of the 13th section of the bill of rights has no application to the case. Authorities *supra*.

7. Nor does this act regulate commerce with foreign nations, among the several States, or with the Indian tribes. It only proposes to regulate the internal traffic of the State, and that is all it does regulate. Every State has the power to prohibit the sale of any article within its limits, either by the importer or any other person, when, in the exercise of its conservative police powers, it becomes necessary to protect the health or morals, or to secure the general welfare of its citizens; and of this necessity each State is the exclusive judge for itself. This power is inherent in every sovereignty, and cannot be contracted by congressional legislation.—License cases, 5 Howard, pp. 586–632.

8. If, however, the court should not assent to the proposition last above stated, then it is insisted, that this power to regulate commerce is admitted by all the authorities not to be exclusive in congress, but to be possessed concurrently by the several States; and that, consequently, an act of the State legislature, imposing regulations on this subject, is not void, but only inoperative when it conflicts with the legislation of congress on the same subject. Therefore, before a citizen can claim immunity from the operation of the law, he must show that, in the particular matter wherein he is sought to be charged by the State law, he has the license of the law of congress to protect him. *Prima facie*, the citizen is amenable to the

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State law ; consequently, it cannot avail the defendant in this case to show that, notwithstanding the State law, the importer has a right to sell his imported liquors, unless he goes a step further, and shows that he is an importer, and that the liquor sold was imported by him, and was sold in the original casks. In other words, it is no defense to the defendant in this case, that another man, under other circumstances, is authorized by the laws of congress to sell liquor under a different state of facts. 5 Howard, 578-620 ; 2 Peters, 251 ; 37 Maine, 161 ; 14 Illinois, 196 ; 28 Ala. 185 ; 3 Rhode Island, 293.

As to the sufficiency of the indictment, see Code of Alabama, §§ 3518, 3519, 3523, 3502-3.

R. W. WALKER, J.—The principal question in this case is, whether the act, under which the defendant was indicted, can be sustained as an exercise of power belonging to the legislature. The solution of this question demands some inquiry into the nature and limits of the legislative power vested by our constitution in the general assembly.

Antecedent to the formation of the Federal constitution, the people of the several States constituted separate, independent, and sovereign communities, with all the rights and powers inherent in sovereignty. Some of these powers they delegated to the government formed by that constitution ; but their essential sovereignty—the supreme ultimate power, which with us resides in the people alone, and cannot attach to government, and which is, in its very nature, incapable of mutilation or division—this they retained. Alabama became a member of the Union upon a footing of equality with the States which originally formed the Federal constitution. Consequently, although she has delegated to the general government the exercise of certain enumerated sovereign powers, she, like her sisters of the confederacy, the original parties to the compact of union, retains in its plenitude, unexhausted and unimpaired, her sovereignty as a State. The very existence of a State implies that it has appropriate organs to will and to act as such ; and the necessity for these gives rise to government, which is, in fact, only the representative

of a State in its sovereign character, and the medium through which, as a sovereign, it speaks and acts. Each State of the Union has, therefore, a separate government of its own, which, being designed to extend to all the multiform and ever changing objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order and prosperity of the State, is the representative and organ of the entire mass of powers properly appertaining to government, except only those which have been delegated to the Federal government, or withheld by the people themselves in organizing the State government.

In the ascertainment of the respective powers of the Federal and State governments, this fundamental distinction is to be observed—that whereas, by the Federal constitution, the States have delegated to the government thereby organized only specifically enumerated powers, withholding all not named, the State constitution, on the contrary, contains a grant from the people of all powers not expressly withheld. In the Federal constitution, the enumeration of powers is of those delegated; in the State constitution, it is of those reserved. But for the enumeration, the Federal government would have no powers; but for the reservations, the State government would possess all the powers inherent in the people. Hence it has grown into a maxim of universal acceptance, among both jurists and statesmen, that “the Federal government can do nothing but what is authorised expressly or by clear implication, while that of the State can do whatever is not prohibited.”—*Sharpless v. Mayor*, 21 Penn. 147–160; *People v. Draper*, 25 Barb. 359–60; *Norris v. Clymer*, 2 Barr, 285; *Calhoun's Works*, vol. 6, p. 224.

By the constitution of this State, the powers of government are divided, and distributed to three departments, the legislative, the executive, and the judicial. Section 1, article 3, declares, that “the legislative power of this State shall be vested in two distinct branches: the one to be style ‘the senate,’ the other ‘the house of representatives,’ and both together ‘the general assembly of the State of Alabama.’” These words, standing by them-



selves, import a general grant of all that legislative power which resides in the people as a sovereign community. But a part of the powers inherent in the people they had already delegated to the general government; and these, of course, are excepted out of the grant here made to the State legislature. The force of these terms is further weakened by qualifications and limitations carefully expressed in the constitution itself. In the first place, the power here conferred is *legislative* power—the power to make *laws*. The executive and judicial powers are expressly confided to other departments, and each of these three departments is emphatically forbidden ‘to exercise any of the powers belonging to either of the others.’ (Article 2, sect. 2.) Here, then, is one restriction upon the legislative department of the State government. It can do no act not of the nature of legislative power. Any attempt on its part to exercise executive or judicial authority would be a naked usurpation. But there are still other restrictions, plainly declared in the constitution. The 1st article sets forth certain rights of the citizen, which are declared to constitute ‘general, great, and essential principles of liberty and free government,’ and which are expressly excepted out of ‘the general powers of government.’ Subject to the restrictions and limitations here indicated, the people of the State have conferred on the general assembly the authority to exercise every power, legislative in its nature, which they themselves, as a sovereign community, possessed. When, therefore, an act of the legislature is assailed as unconstitutional, the objector assumes the burthen of showing, either that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some other provision of the Federal or State constitution.—*Wynehamer v. People*, 3 Kernan, 390, 411, 430, &c.; *Sill v. Corning*, 1 Smith’s N. Y. 303; *Sharpless v. Mayor*, 21 Penn. 147; *Commonwealth v. Maxwell*, 27 Penn. 444–456; *Clarke v. City of Rochester*, 24 Barb. 480.

We are aware that the proposition has been sometimes asserted, that there are limitations upon the legislative power of the State governments, aside from, and inde-

pendent of, the constitutional restrictions to which we have adverted. Such unenacted limitations are sought to be deduced from the form and nature of the governments themselves, the objects which they were designed to accomplish, and the received political maxims and fundamental truths on which they are based. Nor is this view unsupported by the sanction of great names. Judge Chase, in *Calder v. Bull*, 3 Dallas, 386; Judge Story, in *Wilkinson v. Leland*, 2 Peters, 657; Judge Bronson, in *Taylor v. Porter*, 4 Hill, 145; Judge Strong, in *People v. Toynbee*, 20 Barb. 218; Judge Hosmer, of Connecticut, in *Goshen v. Storlington*, 4 Conn. 259; Chancellor Walworth, in *Varick v. Smith*, 5 Paige, 137; Judge Spalding, of Ohio, in *Griffith v. Comm'rs, &c.*, 20 Ohio, 609; and Chief-Justice Parker, in *Ross' case*, 2 Pick. 169, have all, in terms more or less strong, intimated that the authority of the legislature is not absolute in all cases where the constitution has failed to impose an explicit restraint, but that there are other restrictions growing out of the fundamental principles of free government and the original rights of men; and several of these eminent judges have asserted it as an inherent prerogative of the judiciary, independently of constitutional provisions, to arrest the execution of any law which is contrary to the cardinal rules of justice or morality, or, as it is sometimes expressed, which is in conflict with common reason and natural right. See, also, *People v. Supervisors, &c.*, 4 Barb. 64, 74; *Benson v. Mayor*, 10 Barb. 223; *Hatch v. Verm't R. R.*, 25 Verm. 49; *People v. Berberick*, 20 Barb. 230; *Smith on Stat. & Const. Law*, chap. 7; *Ham v. McLaws*, 1 Bay, 91; *Bowman v. Middleton*, *ib.* 250.

But these views are founded on notions of the extent of legislative power in the abstract, and of the nature and function of the judicial office, which are, in our judgment, radically false. It must be remembered, that the very term *State* implies that there is somewhere a sovereign power whose only limit is its will—a power of that transcendent, supreme, illimitable nature, which, in the ascription of it to the English parliament, is described by

the strong word, *omnipotence*. In the United States, this absolute, uncontrollable power resides in the people of each State in the aggregate, as a separate and independent community. As it is expressed by Chief-Justice Gibson, "In every American State, the people in the aggregate constitute the sovereign, with no limitation of its power, and no trustee of it but its own appointee."—*Kirby v. Shaw*, 7 Harris, 258. All the powers, then, included in the omnipotence, which, under the English constitution, is ascribed to parliament, belong in our system to the people of each State in their collective capacity. Lord Coke says, "that the power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."—4 Coke's Inst. 36. "So long as the English constitution lasts," says Blackstone, "we may venture to affirm that the power of parliament is absolute and without control."—1 Bla. Com. 162. Mr. Hallam says, that the absolute power of the legislature, in strictness, is as arbitrary in England as in Persia. And in a recent case, Lord Denman distinctly asserted the supremacy of parliament.—*Stockdale v. Hansard*, 11 Ad. & Ell. 253.

Though there are some loose expressions, in early cases, to the effect that statutes against common right are void, the modern doctrine clearly is, (and this is the logical result of the principle of parliamentary supremacy,) that an act of parliament, of which the terms are explicit, and the meaning plain, cannot be questioned, or its authority controlled, in any court of justice.—*Stockdale v. Hansard*, 11 Ad. & Ell. 253; 1 Kent, 408, 488. Indeed, there is no doubt that everywhere, except in the United States, the judicial is subordinate to the legislative power, and has no authority to annul an act of the latter when its meaning is plain.—*Woodward v. Watts*, 2 Ellis & Black. 457. This necessarily results from a principle, universal in the science of government, that, in the absence of institutional restrictions, the legislative power is subject to no limitations.

In *Calder v. Bell*, 3 Dallas, 386, Mr. Justice Iredell said: "If, then, a government, composed of legislative, execu-



tive, and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void." There is no room to doubt that our various State governments were organized with reference to this principle of the unlimited nature of legislative power in the abstract. Indeed, the object of the State constitutions was not so much to grant as to limit legislative power. The limitations they impose "are not so much limitations of the legislature, as of the power of the people themselves, self-imposed by the constitutional compact."—*People v. Draper*, 1 Smith, (N. Y.) 549.

The whole, unbounded legislative power of the people is granted to the general assembly, subject only to expressed exceptions. Without these exceptions, the power would be as unlimited as that of the people from whom it is derived. For the express reservation of a particular thing out of a general grant proves that the thing reserved would be within the general grant, had not the reservation been made.

Under our system, the power of the judiciary to arrest the operation of an unconstitutional law rests upon the familiar principle, recognized by courts everywhere, that when laws conflict in actual cases, the judge must decide which is the superior or paramount, and which the inferior or subordinate law. Written constitutions are, with us, the fundamental law; and to them acts of legislation must, in case of collision, yield. This is the foundation and the limit of the power of courts to annul an act of the legislature. If we go a step further, and assert their power to avoid such acts because they conflict with some law other than the written fundamental laws of the State and the Union, where shall we go to find it? Who are to settle the principles of eternal justice, and define the limits of so vague a thing as natural right?

If, while the legislature keeps within the written authority under which it acts, its proceedings are to be subject to the supervision and control of the judiciary,

who are thus to be allowed to deprive the general assembly of legislative powers not denied to it by the constitution, it may well be asked, and we know not where to find an answer, *quis custodiet custodes?* So long as the limitations of the constitution are not transcended, the wisdom, policy and justice of laws must be left to the discretion of the legislature; and an appeal from its discretion, to the discretion of the courts, is subversive of the first principles of free government. Lord Coke says, that 'in judicature discretion is a crooked cord.' Burke improved the saying by adding, that 'in legislation it is a golden rule.' The legislature is in direct communication with the people, and responsible to them; and if, while keeping within the limits which the sovereign power has prescribed for its action, it yet violates the abstract principles of justice, and disregards the boundaries of natural right, there is no remedy, save in the punitive power of public opinion, and the right of the people to change the representatives of their legislative sovereignty, and, through them, to repeal the obnoxious enactment.

Notwithstanding occasional intimations from eminent judges to the contrary, it may now be considered an established principle of American law, that while it is the duty of the judiciary to confine the legislative department within the constitutionally declared limits of its power, it has no right to set aside or annul a law, upon the mere ground that it conflicts with natural right, sound morality, or abstract justice.—*Wynehamer v. People*, 3 Kernan, 390, 411, 430, 452, 476; *Town of Guilford v. Supervisors, &c.*, 3 Kernan, 143-5; *Sharpless v. Mayor*, 21 Penn. 147; *Butler v. Palmer*, 1 Hill, 324; *Cochran v. Van Surley*, 20 Wend. 380; *Boston v. Cummins*, 16 Geo. 102, 113; *Stein v. Mayor*, 24 Ala. 614; *Bennett v. Boggs*, 1 Bald. 74; *Golden v. Rice*, 3 Wash. C. C. R.; *State v. Wheeler*, 25 Conn. 290 (297); *Grant v. Courter*, 24 Barb. 232, 237; *Benson v. Mayor, &c.*, 24 *ib.* 248, 452-5; *Clarke v. City of Rochester*, 24 Barb. 446, 480, 489; *People v. Draper*, 25 Barb. 344, 359-60; *People v. Collins*, 3 Gibbs, 348-9; 1 Kent, 448; *Doe v. Douglass*, 8 Blackf. 10; *Hamilton v. St. Louis County Ct.*, 15 Missouri, 23.

We stand, then, upon the proposition, that there are no limits to the legislative power of the State governments, save such as are written upon the pages of the State or Federal constitution.

Is there in the State constitution any provision, which, fairly construed, prohibits the enactment of the law before us? The act is obviously in the nature of legislative power, because it prescribes a rule of action for the people.—Sedgwick on Const. Law, 167–8; Smith on Const. Construction, 290–1. It cannot be assailed, therefore, as an assumption by the legislation of powers legitimately appertaining to either of the other departments of the government. Does it infringe any of those rights of the citizen, which, by the declaration of rights, are expressly excepted out of the grant of legislative power? By the 10th section of that declaration it is provided, that no person ‘shall be deprived of life, liberty, or property, but by due course of law.’ For the original of this we must look to the Great Charter of King John, where, as it stands in the English translation, it reads thus: “No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any way destroyed; nor will we pass upon him, or commit him to prison, unless by the legal judgment of his peers, or unless by the law of the land.” It was this particular clause of this ancient muniment of English freedom which drew from Lord Chatham his memorable saying, that ‘*Magna Charta*, though rude in its Latin, was worth all the classics in the world.’ In the subsequent charter of King Henry 3d, the same provision is found, in a form somewhat more comprehensive and specific.

The expressions, ‘the law of the land,’ ‘due process of law,’ and ‘due course of law,’ as found respectively in the English charters and in the various State constitutions in the United States, are substantially identical, and have always been held to mean a judicial proceeding regularly conducted in a court of justice, as contra-distinguished from statutory enactment. Any other construction would deprive the guaranty of all its force, and put the rights it was designed to protect at the mere mercy of the legisla-



ture. If life, liberty and property could be taken away by the direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the legislature, and the provision would be a mere nullity. Thus construed, the constitution would read, 'no person shall be deprived of his life, liberty, or property, unless the legislature pass a law to do so.' A proposition so plain upon reason and principle hardly needs to be buttressed by authority. Chancellor Kent says, that "the better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice.—2 Kent, 13. Chief-Justice Ruffin states the construction of these words with marked emphasis and directness—"The terms 'law of the land,' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at an end." \* \* "The clause itself means, that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before a judicial tribunal, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually laws of the land for those purposes." Hoke v. Henderson, 4 Dev. 15. Without now endorsing that part of the opinion just quoted, which implies that the trial *must* be 'according to the course, mode and usages of the common law,' it may be laid down, that an act of the legislature is not, and nothing less than a regular judicial trial is, 'due course of law' within the meaning of this clause of the constitution.—Taylor v. Porter, 4 Hill, 140; Jones v. Perry, 10 Yerger, 59; Fisher v. McGirr, 1 Gray, 37; Embury v. Conner, 3 Coms. 511; Greene v. Briggs, 1 Curtis, 311; Wynehamer v. The People, 3 Kernan, 392, 425.

Does the 4th section of the act incorporating 'the Southern University,' deprive any citizen of his property in intoxicating liquors? The form in which the question is stated, assumes that spirituous liquors are property. Of this there is no doubt, and we will not waste words upon

a proposition about which there can be no reasonable dispute.—3 Kernan, 384. All property is equally sacred in the view of the constitution. And hence we are not permitted to listen to a suggestion, that this particular species of property is so pernicious in its influences upon society, that the best interests of the State would be promoted by its destruction. The description of property to which this act refers, has nothing to do with this controversy; for a statute, depriving a citizen of his property in spirituous liquors, is just as clearly in conflict with the constitution, as one which should take from him his lands, houses, and slaves.

When, in the constitutional sense of these terms, is a citizen ‘deprived of his property?’ The answer to this question demands the ascertainment of that shadowy line separating regulation from destruction, which courts have found so much difficulty in defining, and which is, perhaps, destined forever to remain in the catalogue of disputed boundaries. The power to regulate, and the restriction on it not to destroy, though quite distinguishable when they do not approach each other, ‘may yet,’ (to borrow the striking illustration furnished by Chief-Justice Marshall,) ‘like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in making the distinction between them.’ It is not surprising, therefore, that judges should have differed in their opinions upon a question, the intrinsic difficulties of which are so numerous.

We readily assent to the rule, that the constitutional provisions for the protection of life, liberty, and property, are to be largely and liberally construed in favor of the citizen. “A constitution,” says Chief-Justice Gibson, “is not to receive a technical construction, like a common-law instrument, or statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them.” The maxims of political ethics, and the fundamental principles of government, while they cannot be resorted to for the purpose of controlling the constitution, may yet be very properly kept in view, as guides or helps in the interpretation of it. It is right, therefore, to

read the provisions of the constitution designed for the protection of property, in the light of this plain maxim of political ethics, that the right of the citizen to his private property ought not to be interfered with by the State, except to satisfy the demand of some public exigency, or for the protection of life, liberty, or property itself. It is undoubtedly the duty of courts, to so construe the constitution as to make it conform, as nearly as possible, to this cardinal rule of civil polity. At the same time, we are not to wrest the words from the plain and obvious meaning which belongs to them; for that would be to alter the boundaries of the field which the people have declared the legislative power may occupy.—*Hamilton v. St. Louis Co. Ct. 15 Missouri, 23.*

It has been said, that an act of the legislature, prohibiting entirely the sale of an article whose commercial value depends mainly on its vendible quality, would, in the sense of the constitution, deprive a citizen then owning it of his property without due course of law. The line of argument by which this conclusion is reached, may be thus stated: The term *property*, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it; and these are the rights of use, enjoyment, and disposal. These essential characteristics enter into every legal notion of property, and any article or thing eliminated of these attributes ceases to be property. To take away entirely the power of sale, although it does not physically destroy an article of merchandise, does annihilate the right which is its chief characteristic, and from which it derives its principal value. The property, in an article of merchandise which is shorn of its vendible quality, is, therefore, practically destroyed. The provision of the constitution must be supposed to have been made with reference to the known rights of possession, use and sale, incident to, and inseparable from property, and designed alike for the protection of all of them, especially of those without which it would be valueless. In addition to this, one of the purposes of instituting the government, as declared on the face of the constitution, was to “secure to ourselves,



and our posterity, the rights of life, liberty, and property." And, inasmuch as any protection of property, chiefly valuable as an article of commerce, which would leave the owner completely stripped of the right to dispose of it, would be merely nominal and illusory, it cannot be supposed, that the words of this guaranty were used in a sense so narrow and technical, as to authorize the legislature to take from such property its vendible quality, and thus destroy the most important of the rights attached to it.—3 Kernan, 396-7, 456; 20 Barb. 195-6, 216, 221.

On the other hand, it is declared to be an abuse of the term, to say that a man is deprived of property, the possession and use of which are left with him; that this provision has relation only to the title and possession of the substance of property; that it was not designed to take from the legislature the power to declare and limit the uses to which property may be applied; that the existence of such a power in the legislature is essential to the well-being of society, and is lodged with government in all free states, and in every civilized country; that the power to prohibit the traffic in articles deemed injurious to the health or morals, or dangerous to the peace and good order of society, belongs to the class of those police powers which fall within the necessary functions of civil government; and that it is derived, not from a narrow interpretation of this constitutional guaranty, but from a "principle of the common law older than constitutions, and coeval with the earliest civilized ideas of property, namely, that every man shall so use his own as not to injure another, and especially that the use which he makes of his property shall not work a public evil."

With great force it is said: "This provision has no application whatever to a case where the market value of property is incidentally diminished by the operation of a statute, passed for an entirely different object, and a purpose in itself legitimate, and which in no respect affects the title, possession, personal use, or enjoyment of the owner.

\* \* \* *Deprived* is here used in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property. It applies to prop-

erty in the same sense that it does to life and liberty, and no other. \* \* \* When a person is deprived of his property by 'due process of law,' the thing itself, as we all know, with the legal title, is taken away. All his rights in respect to it are entirely extinguished, and transferred with the *corpus* to another. The very language and subject, therefore, of the limitation upon the power, explain and define exactly the nature and character of the deprivation intended. \* \* \* The constitutional provision was intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture, and destruction, without a trial and conviction by the ordinary modes of judicial proceeding."—Opinion of Justice T. A. Johnson, in *Wynehamer v. People*, 3 Kernan, 466–7.

The same judge places the argument on this side of the question in a strong light, by declaring, that it would be only a grave absurdity, "to hold that a statute which forbids a person selling an article of use and consumption, and renders it necessary for him to keep it for his own use and consumption, instead of selling it to others to be used or consumed by them, really takes it away from him, and deprives him of it contrary to the constitution."—3 Kernan, 469.

It is also said, that the word *deprived*, as used in this provision, is employed in the same sense, and is to receive the same construction, as the word *taken* in that provision which is common to all of our State constitutions, and which declares that private property shall not be taken for public use, unless compensation be made therefor.—*Sharpless v. Mayor of Phila.*, 21 Penn. St. R. 147, (166;) *Grant v. Courter*, 24 Barb. 238.

"The word *take*," says Chief-Justice Black, "is one of the commonest and plainest in the language, and cannot be easily misunderstood, either by a lawyer or a layman. As used in the constitution, it has universally, in this State and elsewhere, been interpreted to mean a taking altogether, a seizure, a direct appropriation, dispossession of the owner."—21 Penn. R. 166; 23 Vermont, 361. If these positions are correct, it would follow that a citizen

cannot be said to be deprived of his property, when he is left in the undisturbed possession and personal enjoyment of it, though prohibited from selling it.—See 21 Penn. 167; Hooker v. Canal Co., 14 Conn. 146.

It is not to be denied, that the majority of the adjudged cases favor the proposition, that a statute which entirely prohibits the sale of spirituous liquors, does not, in the sense of this clause, deprive the owner of his property in them.—See the opinions of several of the judges in Wynehamer v. People, 3 Kernan, 435–6–8, 413–14, 442, 451, 466–7, 481; Fisher v. McGirr, 1 Gray, 26–7; Jones v. People, 14 Ills. 196; Goddard v. Jacksonville, 15 Ills. 588; People v. Hawley, 3 Gibbs, 330; Preston v. Drew, 33 Maine, 559; State v. Noyes, 10 Foster, (N. H.) 279; State v. Snow, 3 R. I. 68; State v. Peckham, 3 *ib.* 293; State v. Wheeler, 25 Conn. 290; Lincoln v. Smith, 27 Verm. 328; Sante v. State, 2 Clarke, (Iowa,) 165; State v. Gurney, 37 Maine, 149. See, also, Perdue v. Ellis, 18 Geo. 586; Intendant, &c. v. Chandler, 6 Ala. 899; 30 Ala. 461, 469; 28 Ala. 577.

But upon this question we expressly abstain from the expression of an opinion. The exigencies of the case before us do not demand that we should announce an opinion on this point, and we prefer to remain uncommitted. Wherever it has been asserted that a prohibition of sale is equivalent to deprivation, a total prohibition is meant, or one so nearly so as to show that the exceptions are merely colorable. The prohibition must be of such a character as, in effect, to annihilate, within the entire domain covered by the legislative authority, the quality of sale which makes the property valuable to the owner, and thus to sweep it, as an article of traffic, from the commerce of the State. If any substantial right of sale within the State is left untouched by the law, this, it is admitted, will save its validity. A law, less extensive in its inhibitions than such as is here referred to, might, by lessening the facilities and opportunities of sale, diminish the market value of the property, but would not entirely destroy any one of the known incidents attached to it; and the court would be bound to consider such an act as designed



for the regulation, not the destruction of property. 3 Kernan, *supra*, pp. 397, 399, 421, 456, 405, 435.

Waiving the consideration of the question, whether the privilege reserved by the act, of selling for medicinal purposes, is so trivial and insignificant as to be merely colorable, (3 Kernan, 435-6,) and assuming that the act is to be considered as tantamount to the absolute and unqualified limitation of the sale of spirituous liquors within the limits specified in the act, it is obvious that the entire domestic market is not closed against the owners. A substantial and valuable right of sale within the State is preserved. The prohibitions of the law cover a space of about eighty square miles—the rest of the State, embracing more than 50,000 square miles, is, with a few unimportant exceptions arising out of similar local enactments, left as an open market for the sale of the property.

It has been said, with truth, that “the foundation of the right of acquisition, alienation, and transmission of property, is not in imaginary contracts, or a pretended state of nature, but in their subserviency to the subsistence and well-being of mankind.”—Sir J. Mackintosh, *Law of Nature and Nations*. Man was born for society, and with him the state of nature is the social state. Property, and the rights incident to property, having their origin in the exigencies of civil society, are properly held in subordination to the necessities which give them birth. Hence it may be safely asserted, that the right to dispose of property, as an absolute, unqualified, indefeasible right, is one which has never existed since governments were organized among men. It is a right which has always been held subject to such regulations as, in the judgment of the law-making power, the interests of society required should be imposed upon it.—20 Barb. 179, 232; *ib.* 603.

In every well ordered State, property is held subject to the tacit condition, that it shall not be so used as to injure the equal rights of others, or the interests of the community. Such injurious uses of property may be prevented by such regulations and restraints as the legislature may think proper to impose; and in the establish-

ment of these, the only limits to the legislative authority which we can recognize, are those which are declared by the written fundamental law.—Commonwealth v. Tewksbury, 11 Mete. 57; Commonw. v. Alger, 2 Cushing, 85; People v. Berberich, 20 Barb. 232; Wynehamer v. People, 20 Barb. 603; Shelton v. Mayor, 30 Ala. 540; Mayor v. Yuille, 3 Ala. 137; 2 Kent, 340; License cases, 5 Howard, opinion of Woodbury, J.; State v. Wheeler, 25 Conn. 292, 297. Excise laws, retail and license laws, laws in relation to lotteries and lottery-tickets, laws for the regulation of taverns and public houses, sanitary laws, usury laws, Sunday laws, laws against perpetuities and for the registration of titles, are all so many illustrations of the principle, that the manner in which the owner of property shall hold, use and dispose of it, is a legitimate subject of legislative regulation.—Cases *supra*.

Upon this principle rests the power of the legislature to prohibit entirely the sale of spirituous liquors to minors and students. In the exercise of this undoubted power, the legislature is not confined to direct, but may adopt indirect measures of prohibition. The prevention of such sales to students attending an institution of learning, would doubtless be more effectually secured by prohibiting any sale of liquor within the limited space of country likely to be frequented by the students, than by the simple inhibition of its sale to the students themselves. Such a general prohibition of all sales would, it is true, injuriously affect the rights of some citizens in relation to their property. But the question, whether the public benefits to result from the prevention of intemperance among the students are entitled to more consideration than the personal inconveniences and losses to which third persons would be subjected by the denial of their accustomed right to sell spirituous liquors within the territory to which the act applies, is one of discretion, rightfully belonging to the legislature. With that question, we, as judges, have nothing to do, and about it we have nothing to say.

This law leaves the owner in the undisturbed possession of his property, at full liberty to use and enjoy it himself,

and the only place within a State embracing 50,000 square miles, at which he is by this act prohibited from selling it, is a small portion of a single county, in the immediate neighborhood of an important seat of learning. This is neither a confiscation of the *corpus* of the property, nor the annihilation of any one of the attributes with which it is invested by law and usage. Even upon the supposition that the exchangeable value of property is the property itself, this is, by the act before us, only diminished, not destroyed—the owner is injuriously affected in his right, but not deprived of it; and, as we have seen, it is one of the appropriate functions of legislation to determine when public necessity demands the sacrifice of individual convenience, and government cannot be restrained in the exercise of its legitimate powers because private rights will be thereby injuriously affected.

We do not perceive the force of the argument, that if this act is sustained as constitutional, the general assembly may, at different times, and under various pretenses, pass similar laws, until the entire area of the State is covered by enactments prohibiting the sale of this species of property. If such a general prohibition would be unconstitutional, we are bound to presume that the legislature will never attempt it. But it is sufficient to say, that the general assembly has not, in fact, done what it is suggested it may hereafter do. We are here to decide actual, not possible cases. All that we can, or ought to do, is to determine whether this particular law is constitutional. We are certainly not prepared to hold, that a legislature shall not exercise a constitutional power to any extent, because some succeeding general assembly may exercise it beyond the proper limit. That would be to say, that a lawful power must not be used at all, because it may be abused.

Our conclusion is, that this act does not deprive any person of his property, in the sense of the constitution. Nor are we able to perceive that it is in conflict with any other provision of that instrument.

By the 3d clause of the 8th section of the constitution of the United States, the power to regulate commerce



with foreign nations, among the several States, and with the Indian tribes, is delegated to congress. In pursuance of this power, congress has passed laws regulating the importation of liquors, fixing the duties to which they are subject, and the quantities in which they shall be imported. By these laws, malt liquors may be imported, in casks of not less than forty gallons, brandy in casks of not less than fifteen gallons, and other liquors in quantities of not less than ninety gallons.—Brightley's U. S. Dig. 359, § 166, 366, § 199. It is insisted, that the act under consideration is in conflict with these laws of congress, and therefore unconstitutional. The argument made is, that under these laws, the importer is clothed, not only with the right to bring liquors into the State in the quantities designated, but also with the right to sell them in the form or package in which they are imported; that this right of the importer is not arrested at the external boundary of the State, but enters its interior, and extends to every part of it; that by the terms of this act, no exception is made in favor of the importer, but the prohibition is general, including all persons, whether mere domestic dealers, or direct importers from foreign countries; and that this prohibitory clause not being susceptible of division, so as to separate the words which apply to the importer, from those which refer to the domestic dealer, the whole of this portion of the act is void.

In *Brown v. The State of Maryland*, 12 Wheaton, 419, Chief-Justice Marshall held, that the right to import includes the right to sell; and, consequently, that the laws of congress authorizing the importation of liquors in certain quantities, clothed the importer with the right to sell the same in the form in which they are imported, that is, in the original casks or packages; and that the State government could not deprive the importer of this right of sale, or burthen its exercise by requiring him to purchase a license to sell from the State authorities. But it was further held, that when the commodity had passed from the hands of the importer, into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State,

and might be taxed for State purposes, or its sale regulated just as any other property. It was also said, that the power of congress to regulate commerce is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

The same principles were substantially announced by Chief-Justice Taney, in the license cases, 5 How. 572-6, and seem to have been approved in the main by a majority of the judges who delivered opinions in those cases. See the opinions of Justices McLean, Catron, and Nelson, 5 Howard, pp. 589, 601, 618.

But the proposition, that by virtue of the laws of congress the importer acquires a right to sell in the original packages, of which he cannot be deprived by State legislation, has been considered open to grave question, and was, in effect, distinctly repudiated by three of the judges in the license cases. (See the opinions of Justices Daniel, Woodbury, and Grier, 5 Howard, pp. 611, 618, 631.) By these judges the cases of *Brown v. Maryland*, *supra*, was not deemed an authority for such a rule, inasmuch as the question was not necessarily involved in that case. Nor in fact was it involved in the license cases; and it may be doubted whether it is not still open to discussion upon principle.—See *Wynehamer v. The People*, 20 Barb. 601.

However this may be, there is no doubt that each State has reserved the power to regulate its internal commerce. 9 Wheat. 195. Not only is this so, but all those powers which relate to merely municipal legislation, or what, perhaps, may be more properly called internal police, are reserved to the States; and, in relation to these, their authority is complete, unqualified, and exclusive.—*City of New York v. Miln*, 11 Peters, 102, 139; *Gibbons v. Ogden*, 9 Wheaton, 195, 203, 205, 208; 5 Howard, 574. Upon the retention by the States of these police powers rests the validity of all those quarantine, health and inspection laws, which have been uniformly sustained as constitutional, although they do, to some extent, interfere with and regulate foreign commerce. The inspection

laws authorize the detention and examination of merchandise; the quarantine laws direct possession to be taken of vessels, and require their cargoes and passengers to be stopped, and forbid intercourse with the shore; the health laws provide, in some instances, for the destruction of the cargo.—See 12 Wheaton, 443.

How far the State may go in the conservation of the health, morals, or safety of its citizens—what is the dividing line between a mere police law and a regulation of commerce—is a question of exceeding delicacy and difficulty. We take it for granted, that a State can undoubtedly prevent even an importer from selling intoxicating liquors upon the Sabbath, or to minors or slaves. Such a law, although it would incidentally, in one sense, regulate commerce, would, upon its face, be a police regulation, designed to protect the morals and good order of society. It would be the exercise of a power which the State has never surrendered, and without which it would have but meagre claims upon the respect and affection of its citizens. So the States may prohibit the sale of obscene books, or infected goods, imported from a foreign country, notwithstanding the duty may have been paid upon them, and they may remain in the original package.—5 How. 592, 581, 628, 631–2. See *Holmes v. Jeamison*, 14 Peters, 568; *Gibbons v. Ogden*, 9 Wheat. 203; *City of N. Y. v. Miln*, 11 Peters, 102, 133, 141–2; *Passenger cases*, 7 How. 524, 551.

There is certainly great force in the suggestion, that this provision in the charter of the Southern University must be considered as a mere police law, and not as a regulation of commerce; and that its validity should be sustained, even if it were shown that the defendant was an importer, and that the liquors were sold by him in the casks in which they were imported. This subject is ably discussed by Mr. Berrien, in his opinion as attorney-general, on the South Carolina police bill.—See 4th vol. *Att'y Generals' Opinions*, p. 432, &c. See, also, opinion of McLean, J. 5 Howard, p. 592.

\* But we need not place our decision on this ground. The argument made upon this point mistakes the princi-



ple applicable to such cases. A State law is not unconstitutional and absolutely void, because, in its practical operation, it may sometimes conflict with a law of congress passed in pursuance of the power to regulate commerce with foreign nations. If the provisions of the act be such that they may be assigned to a power not surrendered by the State, and have a legitimate field of operation without coming into collision with the law of congress, there is no doubt that, to that extent at least, they are a valid and constitutional exercise of power, and will be enforced. The most that has ever been said is, that whenever, in the enforcement of such a law, it is brought into actual collision with a law of congress passed in pursuance of the constitution, then, so far as the collision extends, but no further, the law of congress excludes and displaces that of the State. The validity of the State law cannot be questioned, except by those who show that they have rights and privileges derived from an act of congress, of which they will be deprived if the law of the State is enforced against them.—5 How. 574, 585–6, 581–2, 589, 595–6, 601, 608, 619; 5 Wheat. 49–50; Passenger cases, 7 Howd. 552–3; State v. Peckham, 3 Rhode Island, 293; State v. Robinson, 39 Maine, 153; Duer's Const. Jurispr. 256–7; State v. Gurney, 37 Maine, 149.

The license cases, in 5 How. *supra*, illustrate this principle. The terms of the State laws there considered were as general as the words of this act. In neither one of the acts before the court was there an exception saving the rights of the importer; and the point was made in the argument by Mr. Webster and the other counsel, that by the terms of the laws, even the importer was prohibited from selling, and that consequently the acts were unconstitutional.—16. p. 502, 538, 515, 535. But in neither of the cases was it shown that the defendant was an importer, and he was, therefore, not in a condition to insist that the State law should yield to those of the Federal government, which clothe an importer with the right to sell. See 5 How. *supra*; also, State v. Gurney, 37 Maine, 149; State v. Robinson, 39 Maine, 153–4.

The power to regulate commerce with foreign nations

is not so exclusive in congress, as to prevent all State legislation upon the subject. It belongs to the class of concurrent powers; and every such power may be exercised by the State, subject to the single limitation that, in the event of actual collision, the law of congress prevails, and the State law ceases to operate; but only so far as the collision extends.—*City of N. Y. v. Miln*, 11 Peters, 102; *Commonw. v. Kimball*, 24 Pick. 359; *Commissioners, &c., v. Steamboat Cuba*, 28 Ala. 185, 197; *Freeman v. Robinson*, 7 Inda. 321; *Newport v. Taylor*, 16 B. Mon. 699; *Weaver v. Fegley*, 29 Penn. 27; *Cooley v. Board of Wardens*, 12 Howard, 299, 318; *Houston v. Moore*, 5 Wheat. 1.

It does not appear that, in the application of this act to the defendant, any collision has taken place with the laws of congress. He has therefore no right to call upon us to arrest its execution.

2. The demurrer to the indictment should, however, have been sustained, if for other reason, because it failed to name or in any way describe the person to whom the liquor was sold. *Francois v. State*, 20 Ala. 84; *Brown v. Mayor of Mobile*, 23 Ala. 722; *Starr v. State*, 25 Ala. 38. The provisions of section 1059 of the Code have no application to a prosecution founded on the special act under which this indictment was found, and the general form there prescribed is not sufficient in such a case.—*Camp v. The State*, 27 Ala. 53.

The judgment is reversed, and the cause remanded.

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## HEATH vs. THE STATE.

[INDICTMENT FOR RESISTING PROCESS.]

1. *Competency of mulatto as witness*.—A person whose paternal grandmother was the daughter of two mulattoes, each of whom was the child of a full-blooded negro and a white person, is not (Code, § 2276) a competent witness against a white person.

2. *Presumption in favor of ruling of primary court.*—Where the bill of exceptions, professing to set out all the evidence, does not show that the defendant was proved to be a white person, but affirmatively shows that he was not a slave, the appellate court cannot, for the purpose of curing an error in the admission of a person of mixed blood as a witness, presume that the defendant also was a person of mixed blood.

FROM the Circuit Court of Autauga.

Tried before the Hon. A. A. COLEMAN.

THE indictment in this case charged, that the defendant, Seaborn Heath, “did knowingly and willingly oppose or resist William Chavis, a constable of said county, in attempting to serve or execute a peace-warrant, or writ of arrest, issued by Robert Kerr, a justice of the peace of said county.” The facts of the case, as disclosed on the trial, are thus stated in the bill of exceptions: “Legal proof having been made by the State that one William Chavis had been legally elected and duly qualified as a constable of said county, the State then offered said Chavis as a witness, to prove by him that, whilst he was acting as such constable, a peace-warrant, or warrant of arrest, (which was admitted to be in all respects regular and legal,) was placed in his hands, authorizing and commanding him, as such constable, to arrest the said defendant; that he attempted to arrest the defendant under said process, before the finding of the indictment in this case; and that the defendant opposed and resisted him in the execution of the same, and refused to permit him to execute the same. The defendant objected to the competency of said Chavis as a witness, on the ground that he was a person of mixed blood; and showed to the court, that the great-grandfather and great-grandmother of said Chavis were both mulattoes, or persons half-white and half-black, each being the progeny of a full-blooded negro and a white person; that the grandmother of said Chavis was the daughter of said two persons; and that her son, the grandson of said two persons, was the father of said Chavis. On this evidence, the court held said Chavis to be a competent witness, and permitted him to testify, and he did testify to the facts above stated, as proposed to be proved by him; to all which the defendant excepted.”



The defendant proved, that the ground of his resistance to the execution of the process in the hands of Chavis, was that the latter, being a mulatto, had no right to exercise the office of constable; and he adduced to the jury the same proof, respecting the genealogy of said Chavis, which he had previously adduced to the court; "some of the witnesses testifying, also, that the said great-grand-parents of said Chavis claimed to be of Indian, and not of negro blood." "This being all the evidence in the cause, the court charged the jury, that if they believed the evidence, they must find the defendant guilty; to which charge, also, the defendant excepted."

WATTS, JUDGE & JACKSON, for the prisoner.

M. A. BALDWIN, Attorney-General, with whom were WM. L. YANCEY & SON, *contra*.

A. J. WALKER, C. J.—The decision of this court in the case of Dupree v. The State, 33 Ala. 380, is decisive against the competency of William Chavis as a witness, if the defendant is a white man. The bill of exceptions does not disclose whether the defendant was a white man. It sufficiently appears from the record that the defendant was not a slave.—See Code, part 4, title 1, ch. 2, art 10. The great body of our free population is white. Those of mixed blood make the exception to the general character of our population. Such being the case, we must presume, the contrary not appearing, that the defendant was not a man of mixed blood.—Smith v. Oliver, 31 Ala. 39.

Judgment reversed, and cause remanded.

HUDSON *vs.* THE STATE.

[INDICTMENT FOR HOMICIDE OF SLAVE.]

1. *General verdict on good and bad counts.*—A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and be sustained.
2. *Homicide of slave by white person.*—Under an indictment against a white person for the murder of a slave, (Code, § 3295,) a conviction may be had for manslaughter in the second degree.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THE indictment in this case was found at the March term of said circuit court, 1859, and contained two counts; the first charging, that the defendants, Elisha Hudson and Thomas C. Carlisle, "unlawfully, and with malice aforethought, killed a negro man slave, named Gus, the property of one William Fuller, by shooting him with a gun;" and the second, that said defendants, "with malice aforethought, caused the death of a negro man slave, named Gus, the property of said William Fuller, by the use of a gun, a weapon in its nature calculated to produce death." The prisoners pleaded not guilty, and were tried together; and the verdict of the jury was in these words: "We, the jury, find the defendant Thomas C. Carlisle not guilty, and we find the defendant Elisha Hudson guilty of manslaughter in the second degree, and assess a fine against him of \$500, and that he be imprisoned in the county jail six months." The court rendered judgment in accordance with this verdict, from which judgment Hudson prosecutes this writ of error.

GOLDTHWAITE, RICE &amp; SEMPLE, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—We deem it unnecessary to inquire whether the second count in the indictment is or is not good.

The first seems unexceptionable; the finding is a general one; and in such case, the rule is, to refer the finding to the good count.—*Shaw v. The State*, 18 Ala. 547; *State v. Coleman*, 5 Por. 32.

[2.] The indictment was for murder, and the conviction for manslaughter in the second degree. The person slain was a slave. It is contended, that we have no such offense as manslaughter in the second degree, when a slave is the subject of the homicide. We can not assent to this proposition. We hold, that when a slave is unlawfully deprived of life, he is, under our laws, a reasonable creature in being, in whose homicide either a white person or a slave may commit the crime of murder or manslaughter.—*State v. Coleman*, *supra*; *Flanegan's case*, 5 Ala. 477; *State v. Jones*, *ib.* 666; *The State v. Abram*, 10 Ala. 928; *Seaborn v. The State*, 20 Ala. 15; *Dave v. The State*, 22 Ala. 23; *Carpenter v. The State*, 23 Ala. 84; *Eskridge v. The State*, 25 Ala. 30; *Bob v. The State*, 29 Ala. 20; *Oxford v. The State*, 33 Ala. 416.

Under an indictment for murder, a prisoner may be convicted of manslaughter.—Code, §§ 3504, 3601; *Bob v. The State*, 29 Ala. 20; *Henry v. The State*, 33 Ala. 389.

The record is free from error, and the judgment of the circuit court is affirmed.

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## CLEVELAND *vs.* THE STATE.

### [INDICTMENT AGAINST JUSTICE OF THE PEACE FOR EXTORTION.]

1. *Statutory provisions regarding extortion.*—Section 3225 of the Code, defining and fixing the punishment of extortion, contains a typographical error, in the omission of the word *or*, in the fourth line, before the word *other*: the true reading of the section, as shown by the MSS. of the Code, is as follows: "Any justice," &c., "who knowingly takes for services not actually rendered, *or* other or greater fees than are by law allowed," &c.



2. *Constable's fees for levy of attachment.*—The service of a summons of garnishment, upon a person indebted to the defendant in attachment, is a levy of the attachment, within the meaning of the act (Session Acts 1845-6, p. 163) regulating the fees of constables in Mobile.
3. *What constitutes extortion.*—An officer cannot be convicted of extortion, (Code, § 3225,) unless he designedly made charges for services which he knew had not been rendered, or for which he knew that no fees, or fees other than those charged, were allowed; and the fact that, in making out a bill of costs, the aggregate amount of costs charged is less than the full amount which he was entitled to charge, although some illegal items are included, is a strong circumstance to show the absence of the corrupt intent which the law was designed to punish.

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE indictment in this case charged, that the defendant, "being a justice of the peace for Mobile county, knowingly took from William H. Weed fifty cents for issuing garnishment, fifty cents for examination of garnishee, and seventy-five cents for service of garnishment, these being other and greater fees than are allowed by law for such services." "On the trial," as the bill of exceptions states, "the State proved by one A. M. Quigley, who was the only witness examined in behalf of the prosecution, that he was garnisheed in a certain cause pending in the defendant's court; that he told the constable he owed the money to the defendant in attachment, and, whenever he wanted the money, to let him know, as Weed was poor, and he wanted no costs that could be avoided; that he never was examined as a garnishee, but, when informed that the money was wanted, voluntarily paid the judgment and costs to said defendant, taking his receipted bill of items therefor. The State then offered said receipt in evidence, and closed." This receipt, of which a copy is appended as an exhibit to the bill of exceptions, shows that the items of costs collected from said Quigley by the defendant were as follows: "Bond, affidavit, and attachment, \$1,25; levy, and docketing cause, 80 cents; garnishment, 50 cents; garnishee answering, 50 cents; service, 75 cents; affidavit and certifying, 25 cents; *fi. fa.* 40 cents; making money, 75 cents."

"The defendant gave in evidence his docket, containing his entries as magistrate in the case against said Weed, wherein said Quigley was garnishee, and the original papers in said cause; establishing their identity, and the issue and service of summons on the garnishee by the constable, but no other levy; all of said papers being served by the constable, whose name was signed to all the returns. The proceedings had in said cause, as exhibited by the docket and papers, were as follows: 1st, an affidavit and bond for attachment; 2d, a writ of attachment, with a summons for garnishee on the back of it; 3d, a subpoena for two witnesses; 4th, a judgment *nisi* against the garnishee; 5th, a *sci. fa.* for the garnishee; 6th, a judgment against the defendant in attachment; 7th, a judgment final against the garnishee; and 8th, an execution against the garnishee. It was proved, also, that the two witnesses claimed their attendance, and that the execution was returned by the constable 'satisfied.'

"The court charged the jury, that there were two items in the bill given by the defendant to said Quigley, to-wit, the fee for levy of attachment, and the fee for the issue of the summons for garnishee on the attachment, for which said defendant had no right to charge; and that if they believed said defendant had knowingly made and received such charges in his official capacity, in the city and county of Mobile, within twelve months before the finding of the indictment, then the State had made out its case.

"The defendant contended, by his counsel, that although there was a fee taxed in the bill of items for services for which the law allowed no compensation, yet the evidence and papers in the case showed that, in the aggregate, he was entitled to more costs than he had received; and that, in point of fact, he had only received five dollars, when he was really entitled to more. But the court further charged the jury, that though the defendant was entitled, by reason of other items, to more costs than he had actually charged and received, and had only received five dollars, when he might have been entitled to charge more for other items; yet this was no defense for charging for items which he did not perform, though it

could go to the jury, as a circumstance for them to look at in assessing the amount of the fine."

To these charges of the court the defendant excepted.

OVERALL & MOULTON, for the defendant.—1. The only two items of costs alleged to be extortionate, as shown by the bill of exceptions, are the charges for levy of attachment, and for issuing summons of garnishment, together amounting to \$1,25. That the service of a summons of garnishment, written on the back of an attachment, is a levy of the attachment, was expressly decided in *Thompson v. Allen*, 4 Stew. & P. 184. A constable's fee for levying an attachment, under the local act of force in Mobile, is 75 cents; and a justice's fee for issuing summons of garnishment, under section 3049 of the Code, is 50 cents.

2. If either of these items was improperly charged, still the defendant could not be convicted of extortion, under the evidence in the case, because the sum total of the costs charged and collected by him did not amount, in the aggregate, to as much as he was entitled by law to charge. A corrupt intention is a necessary ingredient of the offence of extortion.

M. A. BALDWIN, Attorney-General, *contra*, cited Bishop's Criminal Law, vol. 1, § 424, and authorities referred to in note; 2 *ib.* 326-40.

R. W. WALKER, J.—By section 3225 of the Code, as it is found in the printed copy, any justice, clerk, sheriff, or other officer, "who knowingly takes for services not actually rendered, other or greater fees than are allowed by law for any services done by him, is guilty of extortion," &c. By reference to the manuscript Code deposited in the office of the secretary of state, we find that the word "or," after "*rendered*," is by a typographical error left out of the printed copy; so that, according to the true reading, any officer named is guilty of extortion, if he "knowingly takes for services not actually rendered, or other or greater fees than are by law allowed for any services done by him."

2: The court charged the jury, that there were two



items in the bill of costs introduced in evidence, for which the defendant had no right to charge—namely, the fees for levy of the attachment, and the issue of the summons of garnishment. The bill of costs was, upon its face, designed to embrace the costs both of the justice and constable; and those to which the constable was entitled must be considered as having been collected by the justice for him. Construing the charge in connection with the evidence, it is obvious that the jury must have understood it, and so we presume the court intended it, as an instruction that the fees alluded to did not constitute a part of the legal costs of the case. In reference to one of these items, we think the court erred. By the “act to regulate the fees of constables in the city of Mobile,” approved January 31st, 1846, (Acts ’45-6, p. 163,) constables are allowed 75 cents for levying an attachment. In this case, an attachment was issued, but was not levied otherwise than by the service of a summons of garnishment upon a person indebted to the defendant in attachment. We think that this was a levy of the attachment, within the meaning of the act just cited; and that the constable was entitled to the prescribed fee therefor. In *Thompson v. Allen*, 4 St. & P. 184, this court said: “The statute treats a levy upon property by attachment as equivalent to the personal service of process, and the summoning of one indebted to the defendant is the levy of the attachment upon property.” See, also, *Tillinghast v. Johnson*, 5 Ala. 514; *Drake on Attachment*, § 453.

3. The court also charged, that “if the defendant had knowingly made such charges, and received them in his official capacity,” the State had made out its case. This language is, perhaps, open to criticism, as being calculated to mislead the jury. According to our view of the statute, the officer charged with extortion is not guilty, unless it appears that he has designedly made charges for services which he knew had not been rendered, or for which he knew that no fees, or fees other than those charged, were allowed. It may be that, from proof that the charge was made for a service which had not been rendered, or for a service for which the law did not

allow the fee collected, the jury might feel authorized to infer that the fee was *knowingly* taken within the meaning of the statute. But an officer may, in one sense, knowingly make the charge, and receive the fee, while acting under the *bona-fide* belief that the services had been rendered, and that the fee was legally due; and in that case, we do not think that he should be considered subject to punishment under this law. The statute was designed to reach officers who intentionally charge and take fees which they know at the time they are not authorized to collect. The design on the part of the officer to collect fees to which he is not legally entitled, constitutes the corrupt intent which is the essence of the offense.—2 Bishop's Cr. L. §§ 326-7, 331; Wharton's Am. Cr. L. §§ 2508-9; *Respublica v. Hannum*, 1 Yeates, 71; *Runnells v. Fletcher*, 15 Mass. 525; *Commonwealth v. Shed*, 1 Mass. 227; *People v. Whaley*, 6 Cowen, 661; 1 Bishop's Cr. L. §§ 227, 229, 233, 240, 242, 253.

When an officer, who is applied to for a bill of costs by a person liable to pay them, makes out a bill in which less costs in amount are taxed than are really due, and collects the same, is he guilty of extortion under section 3225 of the Code, if, though he has omitted items which he was legally entitled to collect, he yet charges and receives other fees for services which were not rendered? If the settlement was designed by both parties as a settlement of all the costs of the case, we are not now prepared to say that the officer would be guilty of extortion, unless the fees collected amounted, in the aggregate, to a larger sum than the fees which he was authorized to receive. Without at this time expressly deciding the question here suggested, it is at least clear, that the fact that the officer had collected, in settlement of the costs, a less amount in the aggregate than he had the legal right to demand, would be a strong circumstance denoting the absence of that intention to collect more costs than he was authorized to take, which seems to be the chief constituent of this offense.—1 Bishop's Cr. L. § 253, § 424, and authorities *supra*.

Judgment reversed, and cause remanded.

## BARNETT vs. THE STATE.

## [MOTION TO DISMISS APPEAL.]

1. *Sufficiency of appeal bond.*—An appeal bond, conditioned that, “if said judgment should be affirmed,” and the appellant should pay the appellee “the damages and costs he may sustain by said appeal,” then said bond to be void, &c., is not a sufficient security for the costs of the appeal.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBT. DOUGHERTY.

THIS was a motion, in the name of the State of Alabama, for the use of William Long, against Thomas H. Burch, late clerk of said circuit court of Russell county, and the sureties on his official bond, “for the failure of said Burch to pay over money collected by him on witness-certificates.” The court rendered judgment against all the defendants, for \$33 85; from which judgment an appeal was sued out by William E. Barnett, one of the defendants, who had reserved several exceptions to the rulings of the court on the hearing of the motion. The appeal bond is in the penalty of \$77 70, and conditioned as follows: “Now, if the said judgment should be affirmed, and said W. E. Barnett pay said Long the damages and costs he may sustain by said appeal, then this obligation to be void,” &c. On these facts, the appellee’s counsel submitted a motion to dismiss the appeal, on account of the insufficiency of the appeal bond.

WATTS, JUDGE & JACKSON, for the motion.

BARNETT & PHILLIPS, *contra*.

A. J. WALKER, C. J.—The appeal in this case must be dismissed. The bond is a security for such costs only as the appellee may sustain. If the judgment should be affirmed, the appellee certainly does not sustain all the costs. Therefore, in the event of an affirmance, there is no security for all the costs.—Hinson v. Preslor, 27 Ala. 643; Walker v. Hunter, at the last term.



WARFIELD *vs.* THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Form of judgment of conviction for assault.*—Under a conviction for an assault and battery, the judgment for the fine assessed should be in the name of the State, for the use of the particular county.
2. *Judgment corrected and affirmed.*—A clerical misprision in entering up a judgment, which might have been corrected on motion in the primary court, furnishes no cause for a reversal of the judgment, (Code, §2401,) unless the primary court refused to correct it on motion.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE plaintiff in error, Hazael Warfield, was indicted for an assault on one John Reid, with intent to murder him; was found guilty of an assault, and a fine of \$2,000 was assessed against him by the jury; and thereupon the court rendered the following judgment against him: "It is therefore considered by the court, that the State of Alabama have and recover of the defendant, H. Warfield, and of Caleb Price, his surety, the said sum of \$2,000 fine, together with the costs in this behalf expended, for which execution may issue." Upon this judgment the defendant sued out a writ of error, and he here assigns as error the rendition of said judgment.

GEO. N. STEWART, for plaintiff in error.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—There a clerical mistake in entering the judgment in this case. It should have been entered in the name of the State for the use of Mobile county. Code, § 3619.

This mistake being clerical, and amendable in the court below, without resort to any thing outside of the record and the public statutes, furnishes no cause for reversing the judgment of the city court, unless that court had first refused to make the amendment.—Code, § 2401.

The judgment of the city court is affirmed.

## NALL vs. THE STATE.

[INDICTMENT AGAINST SHERIFF FOR NEGLIGENT ESCAPE.]

1. *What constitutes negligent escape.*—If a sheriff discharges the duties of his office so negligently that, in consequence of such negligence, a prisoner leaves the jail, and walks out into the surrounding town, though for a few minutes only, this constitutes an escape, even if it be shown that the prisoner actually returned.
2. *Variance.*—Under an indictment against a sheriff for a negligent escape, a conviction may be had on proof of a voluntary escape, because the latter necessarily includes the former.
3. *Authority of agent.*—A sheriff's instructions to his jailor, to obey the orders of his deputy as his own, must be considered as including and referring to such orders only as are legal, proper, and customary.
4. *Criminal responsibility of principal for act of agent.*—As a general rule, the principal is not responsible *criminaliter* for the illegal act of his agent, unless done by his express authority; nor are the declarations of the agent, in the performance of such illegal act, competent evidence against the principal when sought to be charged in a criminal proceeding.

FROM the Circuit Court of Pike.

Tried before the Hon. ROBERT DOUGHERTY.

THE indictment in this case contained but a single count, and charged that the defendant, who was then the jailor of said county, "negligently suffered one Daniel W. McKay, in his custody, charged with murder, to escape." The defendant pleaded not guilty, and issue was thereon joined. "On the trial," as the bill of exceptions states, "the State offered as a witness one Henegan, who, by appointment of the defendant, then the sheriff of said county, was jailor during the year 1856, and who testified, that one Daniel W. McKay, charged with murder, was one of the prisoners in the jail of said county in January, 1856, when witness entered on the duties of his office as jailor; that said prisoner was allowed to go out into the jail-yard, and sometimes into the town of Troy, and about the streets of said town; that he was not confined in the dungeon, or felons' room, but sometimes in the debtors' room, sometimes in the passage, and sometimes he went

about the town as stated; that witness charged and received pay for the board of said McKay as a prisoner during the whole time; that said McKay, while thus allowed to go out into the jail-yard, was nevertheless a prisoner, and always returned to the jail, and was always forthcoming at court when his case was called; that it was his (witness') best recollection, although very indistinct, that defendant had told him that said McKay was not in his (witness') custody; that on one occasion, when another prisoner's term of confinement had expired, and one Marius Thompson, who was defendant's deputy, directed witness to discharge him, while witness insisted on instructions to that effect from defendant himself, the defendant instructed him to obey the orders of his deputies as his own; that, in consequence of these instructions, witness was in the habit of yielding obedience to the orders of said deputies; that said Thompson told witness not to confine said McKay in the dungeon, but to give him the liberty of going out as above stated; and that such liberty was allowed said McKay in consequence of these instructions. The defendant objected to the evidence in relation to the instructions of said Thompson, because he was not criminally responsible for the acts of his deputies, and because said Thompson himself was a competent witness for the State. But the court overruled both of these objections, and admitted the evidence; to which the defendant excepted. The evidence conduced to show that the defendant knew how said McKay was kept by the jailor."

There was other evidence in the case, which, however, has no connection with the points decided by this court.

"On this state of facts, the court charged the jury, that if they were satisfied from the evidence that the defendant discharged the duties of his office as sheriff so negligently that, in consequence of such negligence, said McKay left the jail, and went into the town of Troy, even though for a few minutes only, and with the intention to return, and although he did actually return, this was an escape in law, and they must find the defendant guilty. The defendant excepted to this charge, and requested



the court to instruct the jury, that a negligent escape does not include a voluntary escape, but they are distinct offenses; and that if the jury believe from the evidence that the escape of said McKay, if there was any escape, was the result of the defendant's willful act, and not of his negligence, they must find the defendant not guilty. The court refused to give this charge, and the defendant excepted."

PUGH & BULLOCK, for the prisoner.—1. The declarations of Thompson were not competent evidence against the defendant, because the declarations of an agent impose no criminal liability on his principal; and for the additional reason, that Thompson was a competent witness for the State.—*Stewart v. State*, 26 Ala. 44.

2. The charge asked by the prisoner ought to have been given. A voluntary escape is perfectly distinct from a negligent escape; the former being a felony, while the latter is only a misdemeanor. Neither includes the other, and most clearly the less cannot include the greater. If the defendant knew that McKay was permitted to go at large, and especially if it was by his instructions, then the escape was voluntary, and he could not be convicted of a negligent escape.—Code, §§ 3210-11.

M. A. BALDWIN, Attorney-General, *contra*.—1. As to the constituents of an escape, and the correctness of the charge given by the court, see Hawk. P. C. ch. 19, § 5; 1 Hale's P. C. 594; Allen on Sheriffs, 233, and authorities there cited; Luckey v. The State, 14 Texas, 400; State v. Halford, 6 Rich. (S. C.) 58; 6 English, 328; 24 Wendell, 381; 2 Murphy, 386.

2. As to the admissibility of Thompson's instructions to the jailor, see 2 Stark. Ev. 60; 12 Wheaton, 468; 2 Peters, 364.

3. That the charge asked by the defendant was properly refused, see Henry v. The State, 33 Ala. 398.

R. W. WALKER, J.—The charges of the court must be viewed in connection with the evidence which was before the jury. Thus considered, there was no error in

the instruction that, if "the defendant discharged the duties of his office as sheriff so negligently that, in consequence of such negligence, the prisoner left the jail, and went into the town of Troy, even though for a few minutes only, and although he did actually return, this was an escape, and the jury must find the defendant guilty." Roscoe's Cr. Ev. 414; 2 Hawkins' P. C. ch. 19, §§ 5, 6, 10, 13; Steeve v. Fields, 2 Mason, 486; Colby v. Sampson, 5 Mass. 310, 312; Lucky v. State, 14 Texas, 400; Riley v. State, 16 Conn. 47; 2 Bishop's Cr. L. § 917; Wilks v. Slaughter, 3 Hawks, 211; Adams v. Turrentine, 8 Ired. 143. If there had been any evidence that the jailor never lost sight of the prisoner, this, *possibly*, might have justified some qualification of the charge.—See 2 Hawk. P. C. *supra*; 1 Russ. 421; 1 Hale's P. C. 602.

2. Under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, because the former offense includes the latter.—Smith v. Hart, 1 Brevard, 416; Fairchild v. Case, 24 Wend. 380, 383; Skinner v. White, 9 N. H. 204; Henry v. State, 33 Ala. 389. Consequently, under an indictment against a sheriff for a negligent escape, a conviction may be had on proof of a voluntary escape.—Henry v. State, *supra*. There was, therefore, no error in the refusal of the charge asked by the defendant.

3. The bill of exceptions shows, that Thompson was one of the deputies of defendant; that the defendant had instructed the jailor, that he must obey the orders of his deputies as his own; and that, in consequence of these instructions, the jailor was in the habit of yielding obedience to the orders received from the defendant's deputies. Assuming that this evidence was sufficient to show that the defendant had authorized his deputy, Thompson, to give directions to the jailor in reference to the prisoners in his custody; yet, as every man is presumed to be innocent until his guilt is made manifest, this cannot be construed as an authority to Thompson to give any other directions than such as were legal, proper, and customary. 2 Greenl. Ev. § 68. The declarations of his agent do not bind the principal, if not within the scope of his agency,

or expressly authorized. The direction of the deputy to the jailor, to allow the prisoner the liberties enjoyed by him, was a command to violate the law—it was not a legal or proper direction, and was not within the scope of the authority conferred by the defendant. As a general rule, if an agent does an illegal act, the principal is not responsible for it *criminaliter*, unless it is shown that the act was done by his express authority.—Patterson v. State, 21 Ala. 572; Rex v. Higgins, 2 Str. 885; Hern v. Nichols, 1 Salkeld, 289; Mitchell v. Mimms, 8 Texas, 6; Commonwealth v. Lewis, 4 Leigh, 664. The court erred, in permitting the declarations of the deputy to go to the jury, as evidence against the defendant. If it had been shown that the defendant was cognizant of the orders which his deputy gave, and made no objection, the case might have been different.

Whether or not a sheriff is liable criminally, and, if so, how far, for an escape occasioned by the negligence or willful misconduct of the jailor, is a question which is not presented by the record, as it now stands, and on which it is not necessary for us to express our opinion.—See Roscoe's Cr. Ev. 412; 2 Hawk. P. C. ch. 19, § 29; Fell's case, 1 Salkeld, 272; 2 Bishop's Cr. L. § 922; Randolph v. Donaldson, 9 Cranch, 76; Comm. v. Lewis, 4 Leigh, 664.

The judgment is reversed, and the cause remanded.

## BOSTICK vs. THE STATE.

### [INDICTMENT FOR FORGERY.]

1. *Statutory provisions.*—Section 3154 of the Code, respecting the forgery of bank-bills, contains a typographical error, in the use of the word *alters* instead of *utters*.
2. *Sufficiency of indictment.*—In an indictment for the forgery of a counterfeit bank-bill, under section 3154 of the Code, it is not necessary to allege that the bank-bill was issued to circulate as money, nor is it necessary to set out the bill according to its tenor.



ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

THE indictment in this case contained two counts, the first of which was in these words :

“The grand jury of said county charge, that before the finding of this indictment, one Bostick, whose first name is to the jury unknown, having in his possession a certain falsely altered, forged, or counterfeited instrument, purporting to be a bank-bill for one hundred dollars, issued, or purporting to be issued, by the Bank of the State of Georgia, an incorporated bank of the State of Georgia, the said falsely altered, forged, or counterfeited bank-bill or instrument did utter and publish as true, and with intent to defraud; he, the said Bostick, at the time of said uttering and publishing, well knowing said bank-bill or instrument to be forged, altered, or counterfeited; against the peace and dignity of the State of Alabama.”

The prisoner pleaded not guilty, was tried on that plea, and found “guilty as charged in the first count of the indictment.”

BEN LANE POSEY, for the plaintiff in error, made the following (with other) points: 1. The indictment is defective, because it does not allege that the bank-bill was “issued to circulate as money.” The statute on which the indictment is founded, (Code, §§ 3153-4,) creates no new offense, but makes a felony of an offense which was only a misdemeanor at common law; consequently, the indictment should be framed as at common law, and should set out the particular ingredients and circumstances which constitute the offense, as declared by the statute.—*Beasley v. The State*, 18 Ala. 535; *Butler v. The State*, 22 Ala. 43; *Martin and Flinn v. The State*, 29 Ala. 30. The design of the statute was, to prevent the forgery of the common currency of the State, which consists in part of bank-bills; and therefore it describes them as bank-bills “issued to circulate as money.” So it prohibits the forgery, or uttering of the counterfeit, of the gold, silver, or other coin, which is at the time current in the State. If it is not at

the time current in this State, the forgery of it is no crime; and the indictment must, therefore, allege that it was current at the time.—*Nicholson v. The State*, 18 Ala. 529. Bank-bills are as much money as gold or silver, and constitute the greater part of the currency of the State. *Corbett v. The State*, 31 Ala. 329. If bank-bills are wholly uncurrent and worthless, because the bank is broken, they have no inherent value, as gold and silver have; and therefore, there is even greater reason why it should be averred that they were current, or “issued to circulate as money.” To counterfeit a bank-bill which, if genuine, is wholly worthless, does not come within the statute.

2. The indictment does not state the facts and circumstances of the offense, so as to inform the accused “of the nature and cause of the accusation against him,” to enable him to prepare fully for his defense, or to plead a former conviction or acquittal to a subsequent indictment for the same offense; nor does it show to the court that he was tried for the same offense for which he was indicted. 1 Arch. Cr. Law, 84, 85, 119; 2 Cush. (Miss.) 590; 20 Ala. 83; 22 Ala. 10. It does not set out the name of the person to whom the bill was uttered. It contains no appropriate words of description limiting the meaning of the word *bank*, which is a generic term of vague import, and the meaning of which is limited by special words in the statute.—7 Porter, 101; 2 Stewart, 11; 18 Ala. 415. It does not state that the Bank of the State of Georgia was an existing corporation when the forgery was committed. It does not set out the instrument alleged to be forged, according to its tenor or purport, nor give any reason for the omission to do so; and all the authorities agree that this must be done.—*State v. Houghton*, 8 Mass. 107; *Butler v. State*, 22 Ala. 43; *Morton v. State*, 30 Ala. 527; Code, § 3525; *Thompson v. State*, 30 Ala. 28. Whether the instrument was a bank-bill or not, is a conclusion of law, which the court cannot judicially determine unless the instrument is set out, or properly described.

3. The language of the indictment, and of the statute

on which it is founded, is solecistic, contradictory, and absurd.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—This indictment is founded upon section 3154 of the Code, which is in these words: "Any person who utters and publishes as true, and with intent to defraud, any falsely altered, forged, or counterfeited bank-bill, or any one of the instruments, securities, or evidences of debt specified in the two preceding sections, knowing the same to be forged, altered, or counterfeited, is guilty of forgery in the first degree."

In the printed copy of the Code, the word *uttered* in the first line of this section is printed *altered*. But the context clearly shows the mistake, and we have no hesitation in saying that *uttered* is the correct reading.

The principal objection urged to this indictment is, that it does not allege that the bank-bill, which the defendant is charged with having uttered, "was issued to circulate as money." Such an allegation was, we think, unnecessary. It will be observed, that section 3514 reaches persons who utter "any falsely altered, forged, or counterfeited bank-bill, or any of the securities or evidences of debt specified in the two preceding sections." Section 3153 refers to the fraudulent altering of "any bill or note of any bank or banking association of this or any other State, issued to circulate as money;" but it is confined to cases in which such alteration is effected 'by abstracting a part from such bill or note, or by incorporating therein a part taken from some other bill or note.' Section 3152 embraces persons who alter, forge, or counterfeit any check, draft, bill, or warrant drawn on any bank," &c. Section 3151 provides for the offense of altering, forging, or counterfeiting "any bank-bill, promissory note, draft, or check, issued by any incorporated bank or banking company of this or any other State." An indictment under this last section, for altering, forging, or counterfeiting a bank-bill, need not allege that the bill was issued to circulate as money.—See Form No. 39, Code, p. 703.



In like manner, an indictment under section 3154, for uttering and publishing as true "an altered, forged, or counterfeited bank-bill," is good, without an allegation that such bill was issued to circulate as money. It is no part of the statutory description of either of the offenses embraced by sections 3151 and 3154, that the bank-bill must be 'issued to circulate as money;' and hence such an averment is not necessary. It may be that an indictment under section 3153 would be defective, if it failed to allege that the bill 'was issued to circulate as money;' for that is part of the statutory description of the particular offense defined by that section. But these words do not enter into the description or definition of the offense prohibited by section 3154; and it was, therefore, not at all necessary to incorporate them in the indictment.

Under the Code, it is not necessary in an indictment for the forgery of a bank-bill, or for uttering a forged, altered, or counterfeited bank-bill, to set out the bill according to its tenor.—See Form 39, p. 703.

Judgment affirmed.

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## EX PARTE BRYANT.

### [APPLICATION FOR BAIL.]

1. *Right of bail in criminal cases.*—Under the constitution and laws of this State regulating the right of bail, a party in custody, under a charge of murder, is entitled to bail as a matter of right, even after indictment found, unless the court to which the application is made is of opinion, on all the evidence adduced, that the proof is evident, or the presumption great, that he is guilty of murder in the first degree.

APPLICATION for bail, under section 3673 of the Code, by Stephen A. Bryant, William Bryant, James Dobbins, and Eliza Byers; bail having been refused them by the Hon. Wm. S. Mudd, presiding in and for the circuit court of Tuscaloosa. The transcript submitted with the appli-

cation shows that the petitioners were jointly indicted, at the March term, 1859, of said circuit court, for the murder of one Butler; that they were arraigned, on a subsequent day of the same term, and pleaded not guilty; that a day was thereupon set for their trial; that Stephen A. Bryant, on the day appointed for the trial, objected to proceeding with his trial, on account of a defect in the copy of the *venire* served on him; that thereupon, against the wishes and consent of the others, the court continued the cause as to all the prisoners, being of opinion that a severance ought not to be had unless desired by the solicitor for the State; that on a subsequent day of the same term, the prisoners all made application for bail; that the evidence adduced on the hearing of the application, both for and against it, was all reduced to writing, as embodied in the bill of exceptions; that after the evidence was heard, "the court, being of opinion that, after the finding of the indictment by the grand jury, the court had no power to consider any question as to the guilt or innocence of the prisoners for the purposes of bail, but only the grade of the offense, refused to permit the said prisoners, or either of them, to give bail;" and that the prisoners reserved an exception to this decision.

E. W. PECK, for the prisoners.—The 17th section of the bill of rights declares, that "all persons shall, before conviction, be bailable by sufficient securities, except for capital offenses, where the proof is evident, or the presumption great." Capital offenses only are excepted, where the proof is evident or the presumption great, but not otherwise. Capital offenses are not divided by this section into different grades: the only distinction made is, where the proof is evident, or the presumption great, and where it is not. In the first class, no person is entitled to bail; in the second, all persons are entitled to bail before conviction. If the true construction of section 3669 of the Code be, that a person indicted for murder in the first degree cannot be bailed, without regard to the character of the evidence or the presumption in the case, then this section is in conflict with the 17th section of

the bill of rights, above quoted. But the language of this statute, properly construed, means that if the court or magistrate to whom the application is made, after hearing the evidence adduced, is of opinion on that evidence that the prisoner is guilty of the offense with which he is charged, in the degree punished capitally, then he cannot be bailed; otherwise, he is to be admitted to bail.—*Ex parte Banks*, 28 Ala. 99; *Ex parte Mahone*, 30 Ala. 49; *Ex parte McCrary*, 22 Ala. 72.

M. A. BALDWIN, Attorney-General, *contra*.—After an indictment has been found by a grand jury, in a case which may be punished capitally, this raises such a presumption of guilt against the prisoner, for the purposes of capture and custody, as to require him to rebut it by extenuating proof before he is entitled to bail. Under an indictment for murder, not specifying the degree, the prisoner may be convicted of murder in the first degree.—*McCrary's case*, 22 Ala. 65. In capital cases, there are different modes by which it may appear that the proof is evident or the presumption great. It may appear by the testimony of witnesses, in the course of a preliminary examination before a magistrate; on application for *habeas corpus*, before indictment found, before a chancellor, circuit judge, or supreme court judge, it may appear by the examination reduced to writing and returned to the circuit court, as prescribed by section 3416 of the Code, and also by the testimony of witnesses orally examined; but, after indictment found by a grand jury, this, of itself, supplies the evident proof or great presumption contemplated by the constitution, and throws on the prisoner the *onus* of showing extenuating circumstances sufficient to repel the presumption. And the reason of this, aside from the powers and duties of the grand jury, and the guards thrown around them, is to be found in the fact, that the grand jury cannot find a bill of indictment, except upon testimony adduced before them, which, if uncontradicted, would be sufficient to convict before a petit jury.—1 Chitty's Criminal Law, 318–20; *People v. Hyler*, 2 Parker's Crim. Rep. 575.



The 17th section of the bill of rights is in affirmation of the common law on the subject of bail. At common law, all offenses were bailable; though the court of king's bench, in the exercise of its discretion, was guided by a series of decisions.—1 Chitty's Crim. Law, 129. The rule of the common law was, not to bail for murder, high treason, &c., "unless when, in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offense has been committed.—1 Chitty's Crim. Law, 99. In other words, at common law, as under our constitution, bail could not be granted, in cases of murder, treason, &c., where the proof was evident, or the presumption great. "A man charged with murder," says Mr. Chitty, "by the verdict of the coroner's inquest, may be admitted to bail, if it appears by the depositions to amount only to manslaughter; though not after the finding of an indictment by the grand jury."—Chitty's Crim. Law, 129. The same rule is to be found in all the standard authors on criminal law, and is recognized by all the American decisions; with the qualification in some of them, that a prisoner may be bailed, after indictment found, provided he rebuts by evidence the presumption of guilt raised by the indictment.—*Shore v. The State*, 6 Mo. 641; *Ex parte Taylor*, 5 Cowen, 57; *People v. VanHorne*, 8 Barr, 158; *People v. Goodwin*, 1 Wheeler's C. C. 434-47; *People v. Hyler*, 2 Parker's Crim. R. 570; 16 Eng. Law & Eq. R. 367; *People v. McLeod*, 1 Hill, 392, and note *c*; 3 Hill, 668, and note 4; *Ex parte White*, 4 Eng. (Ark.) 324.

R. W. WALKER, J.—By the ancient common law, all offenses, including capital felonies, were bailable. And though by various statutes passed by parliament restrictions have been imposed upon the right of justices of the peace to let to bail; the court of king's bench, in taking bail in cases of treason, murder, and other felonies, has always been, and is now, limited only by its discretion. *Rex v. Remnoni*, 2 Term R. 169; *Rex v. Marks*, 3 East, 157; 1 Chitty's Cr. L. 98, 129; *Ex parte Baronet*, 16 Eng. L. & Eq. 361; 2 Hale's P. C. 129; 2 Hawk. P. C. ch. 15,

§§ 40 and 80. But in the rules which that court observes in admitting prisoners to bail, it is guided by a series of decisions; for the discretion which it exercises is not a wild, but a sound discretion.—1 Chitty's Cr. L. 129. These decisions clearly establish it as a rule of the common law, that before indictment found, a defendant charged with murder will be admitted to bail, whenever, upon examination of the testimony under which he is held, the presumption of guilt is not strong; while, on the other hand, bail is always refused after an indictment for murder has been found by a grand jury.—Petersdorff, *Bail*, 270, 521; *Rex v. Mohun*, 1 Salk. 104; *Lester's case*, 1 Salk. 103; *Tayloe's case*, 5 Cowen, 39; *Regina v. Chapman*, 8 C. & P. 558; *Regina v. Guttredge*, 9 C. & P. 228; 1 *Bacon's Ab.* 581; 1 *Wheeler's Cr. Cases*, 435; *King v. Marks*, 3 East, 175; *People v. Hyler*, 2 *Parker's Cr. R.* 573-4; *People v. McLeod*, 1 Hill, 392. The reason of this distinction will be understood by reference to the practice of the English courts on the hearing of applications for bail. According to that practice, where the application is made after commitment, but before indictment, the court will look into the depositions taken before the committing magistrate, as a part of the documentary authority on which the commitment was founded. In fact, in examining the question of the defendant's guilt, the court is confined to these depositions, and the strongest case of innocence made out by extrinsic evidence will not be received.—1 Chitty's Cr. L. 128-9; *People v. McLeod*, 1 Hill, 394-7; *Rex v. Greenwood*, 2 Strange, 1138; Appendix, 3 Hill, p. 667, and authorities cited; *Tayloe's case*, 5 Cowen, 56; *People v. Hyler*, 2 *Parker's Cr. R.* 570. But, after an indictment is found, the court will not go behind it, to inquire into the merits. The reason is given in *Lord Mohun's case*, 1 Salkeld, 104. In that case, an examination was first had before a coroner, depositions taken, and an inquisition of murder found. Lord Holt, C. J., in accordance with the practice above stated, looked into the depositions taken before the coroner, and let the defendant to bail. An indictment for murder was afterwards found, and the counsel for Lord Mohun moved in

the court of king's bench that the bail be continued; alleging that the same witnesses had been examined before the grand jury as upon the inquisition before the coroner. The answer was—"If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions which we may look into. Otherwise, if a man be found guilty of murder by a grand jury; because the court cannot take notice of their evidence, which they, by their oath, are bound to conceal." The same reason is given for the distinction by Mr. Chitty.—Chitty's Cr. L. 129; see, also, *Rex v. Dalton*, 2 Strange, 911; *Ex parte Tayloc*, 5 Cowen, 56; *People v. McLeod*, 1 Hill, 393; *People v. VanHorne*, 8 Barb. 163; *Territory v. Benoit*, 1 Martin, 142; *Petersdorff, Bail*, 521; *People v. Hyler*, 2 Parker's Cr. R. 571.

It thus appears that, according to the English practice, the court looks alone to the written evidence under which the defendant is held, and cannot receive extrinsic testimony; that all offenses are bailable before indictment, unless from an examination of the depositions taken before the committing magistrate, it appears that the defendant is guilty of a capital felony; and that after an indictment for an offense punishable capitally, the court cannot inquire into the merits, for the reason that the evidence on which the indictment was found is not in writing, and, if it were, could not be disclosed; and the court, having no means of ascertaining otherwise, will, therefore, always imply that the grand jury has not indicted on insufficient proof, and so refuse to bail.—*People v. Hyler*, 2 Parker's Cr. R. 572.

But the rules of the common law, thus established by the English decisions, have been, in effect, abolished by the provisions of our constitution and statutes in relation to bail in criminal cases. The 17th section of our bill of rights declares, that "all persons shall, *before conviction*, be bailable by sufficient securities, except for capital offenses, where the proof is evident or the presumption great." And under our statutes, upon the hearing of applications for bail, either before or after indictment, the court is not, as according to the practice in England, confined to the



written evidence taken down before the committing magistrate; but the case is heard *de novo*, the solicitor and prosecutor are notified to attend, and witnesses are subpoenaed both for the State and for the defendant, and examined before the court, which is to decide the application upon "the evidence produced."—Code, §§ 3721, 3722, 3732-3, 3745-6, 3669, 3673; *Ex parte* Mahone, 30 Ala. 41; *Ex parte* Banks, 28 Ala. 89.

By section 3669 of the Code it is provided, that "the defendant cannot be admitted to bail, in cases which are or may be punishable with death, where the court or magistrate is of opinion on the evidence that the defendant is guilty of the offense in the degree punishable capitally." This section of the Code must be so construed as to make it conform to the 17th section of our bill of rights, above quoted. Accordingly, to justify a court in refusing bail, whether before or after indictment found, the judge must be of opinion, upon the evidence introduced upon the hearing of the application, that 'the proof is evident, or the presumption great,' that the defendant is guilty of the offense in the degree punishable capitally.

In *Commonwealth v. Keeper of the Prison*, 2 Ashmead, under a clause in the constitution of Pennsylvania, declaring that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption strong," it was held, that it was a safe rule, where a malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and in instances where the evidence is of less efficacy, to admit to bail. This decision was cited with approbation by the supreme court of Ohio, in the *State v. Sammons*, 19 Ohio, 139; and that court added—"So with us in Ohio, if the evidence exhibited on the hearing of the application to admit to bail, be of so weak a character that it would not sustain a verdict of guilty, against a motion for a new trial, the court will feel it their duty, under the constitution, to adjudge the prisoner bailable by sufficient sureties."

The supreme court of Mississippi, in construing a clause in the constitution of that State, identical with the 17th section of our bill of rights, and in reference to an application for bail made after indictment found, holds, that "the inquiry is whether the proof is evident or the presumption great; that is to say, is the offense, as shown by the whole testimony, one which must, under the law, be capitally punished." \* \* "If the offense is not shown by evident proof or great presumption to be one for the commission of which the law inflicts capital punishment, bail is not a matter of mere discretion with the court, but of right to the prisoner." And in deciding the application then before it, the court says: "The worst, under the whole evidence, that can be said against the prisoner, is that a doubt may exist as to the malice; and if a well founded doubt can ever be entertained, then the proof cannot be said to be evident, nor the presumption great."—Wray, *Ex parte*, 30 Miss. 679; see, also, *Ready v. Commonwealth*, 9 Dana, 40; *Ullery v. Commonwealth*, 8 B. Monroe, 4; and the syllabus given in *Alexander's Texas Digest*, p. 230, § 4-5, of the decision on the court in the unpublished case of *Wingate v. The Republic*; *Ex parte Banks*, 28 Ala. 89; *Ex parte Croom and May*, 19 Ala. 570; *Ex parte Simonton*, 9 Porter, 392; *Ex parte McCrary*, 22 Ala. 65.

Much testimony is set out in this record, which, while it is competent evidence against some of the defendants, must not be allowed to prejudice the others. In forming an opinion as to the guilt or innocence of any one of the persons accused, we, of course, look alone to so much of the evidence as, according to legal rules, would be admissible against him, if tried separately from his co-defendants. We cannot say, upon the evidence before us, thus considered, that the 'proof is evident or the presumption great,' that the petitioners, Stephen A. Bryant, William Bryant, and James Dobbins, are guilty of murder in the first degree. They are, therefore, entitled to bail as matter of right. We consider it our duty, however, upon the evidence before us, not to let the prisoner Eliza Byers to bail. For obvious reasons, we forbear to comment upon

the evidence. The opinion which we give on this motion ought not to influence the final determination as to the guilt or innocence of any of the defendants. For our judgment is founded entirely upon the written testimony before us, which is, evidently, a very imperfect report of the evidence of the witnesses, and far from being a full exhibition of all the facts of the case.

It is ordered, that the motion of the defendant, Eliza Byers, to be let to bail, be overruled. It is further ordered, that the defendants, Stephen A. Bryant, William Bryant, and James Dobbins be admitted to bail; that the amount thereof in the case of Stephen A. Bryant be \$3,000; in the case of William Bryant, \$1,000; and in the case of James Dobbins, \$500; and that the sheriff of Tuskaloosa county may discharge either of the said defendants above named, out of his custody, upon his giving a written undertaking, signed by himself and at least two sufficient sureties, agreeing to pay to the State of Alabama the amount above designated as the amount of bail in his particular case, unless he (the defendant giving such undertaking) appear at the next term of the circuit court for Tuskaloosa county, and from term to term thereafter until discharged by law, to answer the offense of murder.

## PARNELL vs. COMM'RS' COURT OF DALLAS CO.

[PROCEEDING FOR ESTABLISHMENT OF PUBLIC ROAD.]

1. *Who may resist establishment of public road.*—A person who lives within such a distance of a public road, as established under an order of the commissioners' court, that he or his slaves may be compelled to work on it, has not such an interest as authorizes him to sue out a *certiorari*, for the purpose of revising the proceedings of the commissioners' court before an appellate tribunal.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.



THE record in this case shows these facts: On the application of Elijah Bell and others, for the establishment of a public road in said county of Dallas, the commissioners' court of said county, at its May term, 1858, appointed a jury "to view and mark out" the proposed road. On the 14th June following, in vacation, the jury returned their report to the court. On the 21st June, the court appointed an overseer, and directed him to open the road. The overseer thus appointed proceeded to open the road, summoned the persons liable to road duty to assist in opening it, and returned as defaulters those who failed to obey the summons. At the August term of the court, the jury appointed at the May term, as above stated, made another report of their action in marking out the road. At the same time, John Parnell appeared before the court, and asked leave to contest the validity of the proceedings; and, in support of his right to contest the proceedings, proved to the court, that he was a resident citizen of the county, and lived within three miles of the proposed road; that he owned slaves who were liable to road duty, and had been warned to assist in opening the new road, and had been returned as a defaulter for refusing to obey the summons. The court refused to allow said Parnell to appear as contestant, and also overruled each of the several motions made by him attacking the validity of the proceedings; to each of which decisions exceptions were reserved by him. Parnell then presented his petition to the Hon. Nathan Cook, asking a *certiorari* to revise the proceedings of said commissioners' court; alleging, in proof of his interest and consequent right to contest the proceedings, the facts above stated; and appending a transcript of the proceedings had before the commissioners' court, as an exhibit to his petition. The circuit judge at chambers granted the *certiorari*; but afterwards, during term time, dismissed the *certiorari*, "on the ground that said Parnell had no right to intervene and object to the establishment of said road." To this ruling of the circuit court the petitioner excepted, and he now assigns it as error.

GEO. W. GAYLE, for the appellant.

PETTUS, PEGUES & DAWSON, *contra*.

A. J. WALKER, C. J.—The appellant asserts the proposition, that any one owning slaves, who lives so near the route of a contemplated road that his slaves might be called out to work upon the same, may, by *certiorari*, obtain the revision of an order establishing a public road. If the liability of slaves to work upon a road gives the owner such an interest that he may sue out a *certiorari* in the matter of the establishment of a public road, certainly a man residing within such distance as to be liable to be called to work upon a road might also sue out a *certiorari*; for a man's own time and labor may as justly claim protection from an erroneous order of the court of county commissioners, as the time and labor of slaves. It must be, therefore, that if the owner of slaves may, in such a case, sue out a *certiorari*, any person residing within such a distance that he may be required to work upon the road, may also sue out a *certiorari*. We may, therefore, treat the proposition as if it claimed the privilege of assailing the order for every one who might himself be required to work upon the road, or who had slaves that might be required to do so. If the proposition is correct, every person liable to road duty, who resides within six miles of any part of the road, or has slaves within that distance, might sue out the *certiorari*.—Code, § 1141. There would thus be, whenever a road is established or changed in a populous region, a large number of persons having an equal right to contest the order in a revising tribunal, and, of course, to resist the application for it in the primary court. The inconvenience, confusion and delay in the proceeding, involving as it usually does a matter of public interest, which might result from the allowance to so large a number of persons of the privilege of being parties, argues strongly against the expediency of the rule, which the maintenance of the appellant's proposition would establish.

Unless an interest in the question of the establishment of a road is a *consequence* of a residence within the pre-

scribed distance, by one liable to road duty, he ought not to have a right to become a party to the proceeding. Now every person not exempted *may* be required to work upon a public road within six miles of his residence ; yet it does not follow that he *must* be required to do so. One liable to road duty may live within six, or (as did the appellant) within three miles of a public road, and never be required to work upon it, or to send his slaves to work upon it. The law does not exact that a man shall work upon every road within six miles of him, but upon the road to which he may be apportioned by the apportioners ; provided that he shall not be required to work upon a road, every part of which is more than six miles from his residence. A man may, therefore, reside less than three miles from a contemplated road, and yet he may be required to work upon some other road within six miles of him, and may never be called upon to furnish his own time and labor, or the time and labor of his slaves, in the improvement or opening of the road in question. All that can be said is, that he may possibly or probably be called upon to work it ; and that, therefore, he has a possible or probable interest. If the route of the proposed road would be nearer to him than any other, then the probability of his being called to work upon the road would be increased, for the Code directs that all persons shall be apportioned to the road nearest them, if it can be done consistently with the public interest.—Code, §1157.

If this probable interest would entitle one to sue out a *certiorari* to obtain a reversal of an order in reference to a road, then he would have the same right in reference to every road, a part of which might be within six miles of him. Suppose, then, there should be applications to change three different public roads, all within six miles of the same person. He might, upon the proposition of the appellant, become a contesting party in all the applications, although he would not probably ever be called to work upon each one of the roads.

If we hold that such an interest gives a right of contestation, where will we draw the line which excludes



persons from the right? One whose fixed and permanent business requires him to constantly pass with stages or loaded wagons over the road, has a more certain, and perhaps a greater interest in the quality and location of the road, than he who may probably be called to work upon it a few days each year. Upon what principle, if one may be a party, shall the other be excluded? There is no such principle. All such interests fall in the category of those pertaining to many members of the community, which must be more or less affected by the action of the commissioners' court in reference to roads, and which nevertheless do not give a right to become formal parties on the record.

It is not to be apprehended that any serious injury can result from a denial of the right to every one liable to road duty to become parties to the record. The court of county commissioners is composed of members elected by the people of the county; and in determining as to the expediency of action in reference to the public roads, it exercises a sort of legislative power, and has a wide discretion.—*Hill v. Bridges*, 6 Port. 197. Thus elected by the people, and unrestrained by rules of evidence in passing upon the merits of applications, there is no danger of their refusing to listen to the petitions and arguments which any of the people may present, and indeed it would be improper for them to do so. When the question of expediency has been tried and determined, no public good could result from opening the door for every discontented man in the community to institute a search for some irregularity in the proceeding, for which he might obtain a reversal in a higher tribunal.

In the case of *Moore v. Hancock*, 11 Ala. 245, the attention seems to have been first drawn to the question now before us; and in that case, the court, in reference to the establishing and changing of public roads, said: "These are matters of public concern, in which it can rarely happen that private interest is involved beyond the value of the land over which the road passes; and it is possible it is in this connection alone, that individuals have any right to re-examine the decisions of that body, to which this

duty is entrusted." The same subject again came up before this court in *Cresswell and Monette v. The Commissioners' Court*, 24 Ala. 282, and the following language was used: "We hold, that the interest which will authorize any one to be made a party to these proceedings, must be an interest in property, something capable of individual ownership, and not a mere interest which the party holds in common with the rest of the community. It must relate to him separately as an individual proprietor, and exist as a private right, which he, as a private man, may vindicate by suit; for, if it be only a right which he holds in common with the rest of the community, it is a public right, and is not placed by the law in the keeping of any private individual." The mere liability to be called to work upon the road is not the interest here spoken of. It is when the action of the court will produce an interference with individual property, that the person affected may intervene. A liability of one, in common with the rest of the community, to be called to aid in repairing the road, does not so infringe or interfere with the property of an individual, that he may intervene.

A diligent examination of the decisions of other States has not enabled us to find any authority precisely in point upon the question, but we have found, and cite several cases which contribute to support our argument.—*Little v. May*, 3 Hawkes, 599; *Barr v. Stevens*, 1 Bibb, 292; *Cole & Chara v. Shannon*, 1 J. J. Marsh. 218; *Nicholson v. Stocket*, Walker's (Miss.) R. 67.

We decide the proposition of the appellant, stated at the commencement of this opinion, against the appellant, and affirm the judgment of the court below.

## FARRELLY vs. MARIA LOUISA, (WOMAN OF COLOR.)

## [PETITION FOR FREEDOM.]

1. *Who may institute suit for freedom.*—Section 2049 of the Code, respecting suits for freedom, is not confined in its operation to persons of African blood, but includes all persons who are claimed and held as slaves.
2. *Suppression of deposition on account of defective certificate of commissioner.*—Under the provisions of the Code, (§§ 2322-23,) the failure of the commissioner to certify that he has personal knowledge of the identity of the witness, or that proof of such identity was made before him, is good cause for the suppression of the deposition.
3. *Competency of vendor as witness for purchaser.*—In a statutory suit for freedom, the defendant's vendor is a competent witness for him, (Code, § 2302,) when it appears that he only sold and conveyed "his interest" in the petitioner as a slave.
4. *Proof of status of petitioner.*—In such action, the fact that the petitioner's mother, before and about the time of his birth, went at large, was treated and dealt with as a free person, was not under the control of any other person, and conducted herself as a free person, is competent evidence for the petitioner.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS was a statutory suit for freedom, (Code, § 2049,) instituted by Maria Louisa, a woman of color, against Edward Farrelly, the appellant. The defendant denied the allegation of freedom, and insisted that the petitioner was his slave; and the cause was submitted to a jury on an issue of freedom *vel non*. Before the trial commenced, as appears from the bill of exceptions, the defendant moved the court to suppress the depositions of Edward Barrett and William Castell, which had been taken in behalf of the petitioner, "on the ground that the commissioner had not certified that he had personal knowledge of the witnesses, or that proof of their personal identity had been made before him." The court overruled the motion, and the defendant excepted. The certificate appended to said depositions, omitting the immaterial portions, is as follows: "I, James Y. Blocker," &c., "do hereby certify, that I caused Edward Barrett, William



Castell and Robert Ker, to come before me at the time and place hereinabove stated; that said witnesses were each duly sworn by me, and severally testified as is hereinabove set down; that the testimony of said witnesses was by me reduced to writing, except that of William Castell, which was written by himself in my presence; and that each of said witnesses subscribed his name to his own testimony in my presence, after the same had been by me read over to him. In testimony whereof," &c.

The petitioner examined one Mrs. Thompson as a witness, who testified, in substance, that she became acquainted with the petitioner's mother, in New Orleans, in 1834-5, and lived within one or two squares of her house; that her mother was a woman of yellow complexion, and, so far as witness observed, always acted as a free person; that she died in 1839, leaving the petitioner an infant about one year old. "The petitioner's counsel asked this witness, if the petitioner's mother was generally considered and called a free person; to which the witness answered, that she was generally so considered and called." To this question and answer each the defendant objected, and reserved exceptions to the overruling of his objections; and exceptions were also reserved by him to the admission of similar statements by other witnesses.

It further appeared, from evidence introduced by the petitioner, that after the death of her mother, as above stated, her father, a white man, placed her in the care of a Miss Richards in New Orleans; that she was afterwards seen and recognized in Mobile by several persons who had known her in New Orleans; that from 1844-5 to 1854-5, she was in the possession of one Burns, who claimed her as a slave, and exercised acts of ownership over her; and that in 1855, or soon afterwards, one Patrick Summer, of New Orleans, at the instance of some persons in Mobile, who had heard that the petitioner was free, came over to Mobile for her, and carried her with him to New Orleans. Some of the petitioner's witnesses further testified, that her mother seemed to be of Indian or Mexican descent, and had the characteristic features of an Indian Mexican or Mexican Indian. On the other

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Farrelly v. Maria Louisa, (woman of color.)

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hand, the defendant adduced evidence tending to show, that the petitioner and her mother were slaves; and, for this purpose, offered the deposition of said Patrick Summer, who testified, that such was the fact; and further, that the petitioner had belonged to Miss Richards, from whom he purchased her, and that he afterwards sold "his interest" in her to the defendant. The court excluded the deposition of this witness from the jury, on motion of the petitioner, "on the ground that it appeared from the deposition itself that said Summer had sold the petitioner to defendant, and was, therefore, incompetent to testify in this case;" to which ruling of the court the defendant excepted.

There was other evidence in the case, but the material facts sufficiently appear from the above statement.

"The court charged the jury as follows: 'That the issue was, whether the petitioner was free or not; that it was immaterial whether or not the defendant in this case had title to her, if she was a slave; that by law, in this State, a person of color is presumed to be a slave, until it is proved that he or she is free; that this, however, applies only to Africans, or persons having negro blood; that if it was proved to their satisfaction that the petitioner's mother was an Indian or Mexican, this would remove the presumption of slavery arising from color, and they should find for the petitioner; that if her mother was a negro, or of African descent, the presumption would be that she was a slave; but that proof of the fact that her mother acted as a free person, would be evidence tending to repel that presumption; and that if the jury believed from the evidence that her mother was free, there was no necessity to show any record or paper evidence of her freedom, and the *onus* of showing that the petitioner was a slave would be thrown on the defendant.' To which charge, and each portion thereof, the defendant excepted."

The several rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

WM. G. JONES, for the appellant.

JNO. T. TAYLOR, *contra*.

STONE, J.—We cannot agree that the provisions of section 2049 of the Code are confined to persons of African blood. We think they embrace all persons who are claimed and held as slaves.

[2.] Under the principles we laid down in the case of Thrasher v. Ingram, 32 Ala. 645, and in Buford v. Gould, at the present term, the city court erred in refusing to suppress the depositions of the witnesses, Edward Barnett and William Castell.

[3.] The court erred, also, in excluding the evidence of the witness, Patrick Summer. Although he was Mr. Farrelly's vendor, yet that fact is shown only by his deposition, which was offered in evidence. In the same deposition it is shown that he, the witness, was the defendant's vendor only in this, that he had sold *his interest* in the petitioner to Farrelly. This language implies only a quit-claim, and not that the witness was bound to indemnify Farrelly, should his title fail. It is not, by anything in this record, made to appear that the record of recovery in this case can be evidence for or against him in another suit, in the legal sense of that term.—Code, § 2302; Harris v. Plant & Co., 31 Ala. 639; Rupert v. Elston, at the present term.

[4.] The questions raised on that part of Mrs. Thompson's testimony which was objected to, and on the charge, may be considered together. They present the question of the admissibility and competency of certain evidence to prove the *status* of the petitioner. We think it clearly competent, in such case, to prove that the mother of petitioner, before and about the time she gave birth to Louisa, went at large, uncontrolled in her movements, and that she was dealt with and treated as a free person; and that generally, her deportment was that of a person having control of her own movements. On such issue, it is also permissible to show, either that she was, or was not, under the direction and control of another. Whether such evidence is sufficient, or whether it is overturned by proof of ownership, is a question for the jury. Its weight must depend on the length of time and circumstances surrounding her, during which she is alleged to have been



mistress of her own movements.—*Becton v. Ferguson*, 22 Ala. 599. These rules are, perhaps, sufficiently definite to govern another trial.

Reversed and remanded.

## WILSON vs. WALL AND WIFE.

[BILL IN EQUITY FOR RECOVERY AND PARTITION OF LAND.]

1. *Construction of Dancing Rabbit Creek treaty.*—Under the 14th article of the treaty between the United States and the Choctaw Indians, concluded at Dancing Rabbit creek on the 15th September, 1830, the reservation to which each "head of a family" was entitled is limited to one section, or six hundred and forty acres of land; and the other reservations, to or for each child of the family, were intended to confer a beneficial interest on the children themselves, either to them directly, or to their parents in trust for them.
2. *Construction of treaties generally.*—Treaties are the supreme law of the land; rights which have vested under them, cannot be destroyed or affected by the action of either the legislative or the executive department of the government, nor by the rules of practice adopted by the officers of any department of the executive government; nor are the courts, in determining those rights, to be controlled by the action or rules of practice of the other departments of the government.
3. *Title to Indian reservation.*—Although the treaty itself establishes the existence and extent of the right which the beneficiaries take in the reservation thereby secured to them, yet the title to the particular lands to which each was entitled is conveyed by the patent subsequently issued.
4. *Trust implied against holder of legal title.*—A patent being issued to a Choctaw Indian "and his heirs," for all the lands to which he and his several children were entitled as their reservations under the treaty of 1830, a court of equity will hold the legal title subject to the equitable rights secured to the children by the treaty.
5. *Who is purchaser for valuable consideration without notice.*—A purchaser from a Choctaw Indian, knowing that his vendor claimed the land as his reservation under the treaty of 1830, is not entitled, as against the children of his vendor, to protection as a purchaser for valuable consideration without notice.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the appellees, who were the surviving children and heirs-at-law of William Hall, deceased, against Samuel Wilson and others; and sought to recover a certain tract of land, which the complainants claimed as hereinafter more particularly stated, to have the land partitioned among themselves, and to make the defendants account for the rents and profits while in their possession. The lands in controversy, amounting in all to 2240 acres, were patented by the United States to said William Hall "and his heirs," on the 29th June, 1841, as his reservation under the treaty with the Choctaw Indians, concluded at Dancing Rabbit creek, on the 15th September, 1830; and were claimed by the complainants partly as reserved to or for them under the provisions of the treaty, and the residue by descent from their said ancestor; while the defendants claimed under several purchases and conveyances from said William Hall. The defendants answered, and severally denied the material allegations of the bill respecting the rights asserted by the complainants. By agreement of counsel, the defendants were allowed to sever, and the cause was heard as to the defendant Wilson, on the following agreed statement of facts:

"It is admitted and agreed, that the south-east quarter, and the south half of the north-east quarter, of section fourteen, township eighteen, range one, east, referred to in the complainants' bill, and sought to be recovered of Wilson, form a part of the lands occupied by the Choctaw tribe of Indians at the date of the treaty of 15th September, 1830, concluded at Dancing Rabbit creek, between the United States and said tribe of Indians, and constitute a portion of the tract reserved to or in the name of William Hall under the 14th article of said treaty, and embraced in the patent issued by the United States to said William Hall, dated 29th June, 1841; a copy of which patent is hereto annexed, and made a part of this agreed case. Also, that William Hall has died since the issuance of said patent; that the complainants, Catharine, Jane, Margaret, Sarah and Joseph, are the children of said William Hall, who resided with him at the date of

said treaty ; and that said William then had two other children living with him, Silas and Eliza Anne by name, who, since the making of said treaty, and before the institution of this suit, have died without issue. Also, that said William Hall claimed the lands described in said patent, as the 'Choctaw head of a family,' under and by virtue of the 14th article of said treaty ; that in asserting his claim to the reservation granted, he reported himself to the United States agent as the 'Choctaw head of a family,' living on said lands at the date of the treaty, and having an improvement thereon, with — children over ten years of age living with him, and — children under ten years of age ; and that the names of the children were neither taken down, nor reported by the agent to the government. Also, that upon William Hall's fulfilling the five years residence on the land after the ratification of the treaty, the grant in fee, a copy of which is hereto annexed, was issued to him. Also, that the defendant Wilson, in good faith, on the 13th December, 1834, made the contract with said Hall for the purchase of the lands in question, a copy of which is annexed to his answer ; that he paid Hall the purchase-money, amounting to \$750, and on the 29th February, 1836, received from Hall a deed of conveyance for the land, with clause of warranty of title, went into possession thereof, has been in possession since, and made thereon valuable improvements,—the extent of their value to be ascertained hereafter. There is no evidence that Wilson had notice of any outstanding claim or title to the land by the children of Hall, unless he [can] be charged with it from his answer and the foregoing facts agreed on. It is further agreed, that the business of carrying into effect the provisions of the treaty on the part of the United States appertained to the war department ; that in ascertaining to whom the patents should issue for the lands, under the 14th article of the treaty, it was not usual or customary to take down or return to the department the names of the children of heads of families ; but in executing this article of the treaty, the agent returned the names of the heads of families, with the number and ages of their children ; and in issuing the grants in fee



simple under this article of the treaty, it was usual and customary to issue them in the same form with the patent to Hall, until the passage of the act of 1842, which changed the practice in issuing patents, as explained in the opinion of Attorney-General Legare, a copy of which is hereto annexed. It is further admitted, for the purpose of showing the practice of the government, prior to 1842, in issuing patents, that Alexander Brashears, Betsy Buckholts, John Walker, Betsey Pinson, and others, received patents for their respective reservations under the 14th article of the treaty, in the same form with that issued to Hall. It is admitted, also, that the land embraced in this agreed case formed a part of said William Hall's reservation under said 14th article of said treaty, but was no part of the section on which he lived at the date of the treaty. Under these agreed facts, each party reserves the right to insist, either in this court or in the appellate court, on any question which the facts may present."

The patent to William Hall, after reciting that he became entitled, under the 14th article of the treaty, "to three and a half sections of land out of the lands ceded to the United States by the said treaty," and that the lands specified in the patent "have been located in favor of said William Hall as his reserve," and that the location has been approved by the president of the United States, conveys the lands "unto the said William Hall and to his heirs forever."

On final hearing, the chancellor held, that William Hall, under the 14th article of the treaty, (for which see the opinion of the court,) took the single section of land on which he resided in his own right, and the remainder in trust for his children; and that the patent was notice to the defendant Wilson that the lands were subject to the trust. He rendered a decree in accordance with these views, ordering an account, partition, &c.; and his decree is now assigned as error.

LOMAX & PRINCE, for the appellant.—1. Though the phraseology of the 14th article of the treaty may be

untechnical and obscure, a critical analysis of its language will sustain the construction which has been placed upon it by the government in carrying out its provisions. It cannot be disputed, that the absolute property in the lands in question was vested in the United States; not merely in right of eminent domain, but actual and entire seizin and ownership. This is the principle on which the government has ever acted with regard to the aborigines, as exhibited in our colonial and national history; and it has been sanctioned by the uniform current of decisions. The treaty itself, as well as the grant, was the assertion and admission of this principle. The grant of June 29, 1841, by which the United States parted with its title, must alone determine what disposition the United States intended to make. The reservation expressed in the treaty cannot be construed as vesting title in the Indians: on the contrary, it is expressly a retention of title by the United States, which, in certain subsequent contingencies, the United States promised to part with. This reservation was a voluntary restraint, imposed by the United States on itself, against making any alienation of the land in the ordinary way. The treaty speaks of the reservation by itself, and of the grant by itself; and there is no inconsistency between the reservation and the grant to William Hall of all the lands embraced in it. The grant was made in strict conformity with all that was stipulated in the reservation, as regards both the person and the lands.

The treaty only describes the person who is contingently to be entitled to the reservation. He must be the Choctaw head of a family, and be desirous not only to remain, but also to become a citizen, and must signify to the agent his intention to do so. These are conditions precedent, (if conditions they can be called,) and rest, not so much on performance, as in a feeling of desirousness, and signifying his intention, and fitting himself to receive the proffered bounty of the government. The treaty then proceeds to make further provision in reference to the state and condition of the head of the family, and, before mentioning the children, says, "in like manner shall be entitled," &c. It does not say that the children

“in like manner shall be entitled,” as would certainly have been expressed if so intended. The words can only refer to the head of the family, and must prevail throughout as to all that is reserved. They may be said to constitute the *habendum* and *tenendum* of the instrument, with no expression to restrict or qualify their import. The United States may have had the benefit of the children in view, and designed to promote it by enlarging the bounty to the parent. The word *for* may, in perfect consonance with its ordinary use, mean *because of* such child, or on account of having such child; and is entirely consistent with what had been previously declared, as to the person pointed out as the one entitled to the reservation. The other interpretation is inconsistent with the context, and requires the interpolation of other words expressive of an interest, legal or equitable, to be conferred on the child. As little reliance can be placed on the words, “*to each child*,” for it cannot be supposed, that by changing the word *for*, which is used in respect to the half-sections, into the word *to* in connection with the quarter-sections, any change in the sense was intended.

It would be a waste of words to argue, that the Choctaw head of the family, who is entitled to the section, is the same person to govern the verb *shall be entitled*, when the treaty proceeds to speak of the less quantities. The treaty nowhere treats these lands as the subject of divers reservations, no more than it does to divers persons. It is the one reservation, covering 640 acres, which is enlarged to embrace the adjoining locations, according to the number and ages of the children. The words are, “*Said reservation shall include*,” &c. If it was intended that the 640 acres should be the separate location of the parent, it would seem reasonable that this particular section should include the present improvement of the head of the family; but the treaty is silent as to what particular part of the reservation shall include the improvement. Unless the reservation was intended as a unit, both as to the person entitled and as to the land, there is an incongruity in the promise that a *grant* in fee shall issue, which obviously contemplates but a single grant, while a reser-



vation to several could only be effected by divers grants to the respective portions.

Although each Choctaw head of a family and children are antecedents, it does not follow that the pronoun *they* includes the children. Whether the pronoun had been *he* or *they*, it would be alike general, and must receive a definite application from the context. Notwithstanding each Choctaw head of a family had been first spoken of in the singular, there was no departure from the rules of grammar, or from ordinary parlance, that the language may group all described by the pronoun *they*, in the provision made for all the heads of families, instead of repeating "each Choctaw head," &c. If *they* comprehends children as well as heads of families, then children are required to conform themselves to all the pre-requisites which are imposed on the heads of families, as respects both the reservation and the grant, for a compliance with which they (those of tender years at least) would be utterly incapable. Suppose any of the children should leave their parent, and go abroad before the expiration of the five years, would the United States be then justified in withholding a grant to the entire tract of land, or in resuming so much as had been allotted to him on account of such child? If a trust for the children was designed, the simple and operative words would not have been omitted; for, in another part of the same instrument, where such intention manifestly prevailed, the appropriate and technical words to create a trust for the children are employed. 7 U. S. Statutes, p. 341, appendix, art. II.

2. Whatever interpretation this court might incline to put on this treaty, the patent alone can be referred to as the source of title. If the stipulations of the treaty have been violated, the parties complaining may apply to the justice or favor of the government for compensation. The children cannot claim participation in the lands conveyed by solemn act to Hall, though done in utter derogation of their rights. This grant, until impeached by proceedings in the appropriate judicial forum to vacate or correct it, must be conclusive in all respects. As an act of the executive within its proper constitutional function, its

must at least claim the deference of the other branches of the government, unless palpably unlawful and in violation of executive duty; more especially since this act originated with the treaty-making power, which is exclusively with the executive and the senate. And this deference should be more readily yielded, in view of the fact, which is shown by the agreed case, that this construction was persisted in by the government until 1842, when, perhaps, all the grants under this article of the treaty had been issued. A reversal of that practice now by the courts would produce incalculable disturbance, and would operate most oppressively on innocent purchasers, who have been resting on their title under the imposing authority which the uniform practice of the government had so long sanctioned. The complainants, then, cannot go behind the patent for a legal title, and their claim to an equitable title under it cannot be sustained.

3. It may well be questioned whether the doctrine of constructive trusts, as applied between individuals, can be recognized in regard to titles emanating from the government. It is admitted, however, to be an established principle, that conveyances, however completely the legal title in them may be assured to the grantee, may be subjected in equity to the equitable title in another. Here, there is no consideration proceeding from the complainants to confer on them a meritorious claim. They come in as volunteers, setting up a pretended trust against an absolute grant from the government, and against a purchaser under it for valuable consideration. There is no express trust declared in the grant, or in the conveyance from Hall. To make such declaration effectual, it must be made with the intention to create a trust, and must be plain and direct.—Lewin on Trusts, 147. The grant expressly refers to the treaty, and conveys to Hall a quantity of land, more than 640 acres, which could only have accrued to him because of the number and ages of his children; yet it declares that he is entitled to all this land, and grants it all to him, his heirs and assigns forever. If there be any trust for the children, it must be a constructive trust, which is negatived by the express

terms of the grant. All the authorities concur, that a trust is never implied or presumed, except in case of absolute necessity. How can this court build up on the words *for* and *to*, which are admitted by the chancellor to be of equivocal import, an equitable title in the children? The purchaser from Hall cannot be disturbed by such a claim, nor his conscience charged with such a trust. The equity itself is at least doubtful, and there is nothing in the patent to charge him.—Lewin on Trusts, 579; 2 Spence's Equity, 195.

4. If, as the complainants contend, a title vested in them under the treaty, which could not be affected or impaired by the subsequent action of the government, then their remedy is at law, and the prayer for partition among themselves cannot sustain their bill against the defendants.

In Newman v. Harris & Plummer, 4 How. Miss. 522, the question as to any title or interest in the children of the reservee did not arise, and was not decided; nor was there any evidence in that case of the practice of the government in issuing patents under the 14th article of the treaty. If that case be any authority at all in the case at bar, it is only to establish a *legal title* in the complainants

R. H. SMITH, *contra*.—1. The appellees contend, that under the 14th article of the treaty, the children of a Choctaw head of a family take estates, legal or equitable, such as the parent cannot alien; and insist, that this construction is apparent from a consideration of the language of the 14th article, from the whole treaty, from the object and design of the parties, and from the effect of a contrary construction. The construction for which the appellees contend, was adopted in Pickens v. Harper, 1 Sm. & Mar. Ch. 539. See, also, Newman v. Harris & Plummer, 4 How. Miss. 564. The 14th article of the treaty is itself a grant, and operates as such, subject to be defeated on non-performance of the conditions.—Newman v. Harris & Plummer, 4 How. Miss. 560. This view is supported by the opinion of Mr. Attorney-General Legare, and



results from the constitutional provision that treaties are the supreme law of the land.

The terms by which the half-sections and quarter-sections are secured, are fit and apt expressions to create a trust. Indeed, the word *to*, applied to the quarter-sections, might well justify the position that the grant is to the child directly. But the appellees' case is sufficiently made out, by showing that the grant is to the parent, in trust for the child, and without power of alienation by the parent. The appellant does not deny that a grant to one, for another, creates a trust; but seeks to find something in the language of the treaty, or deducible from its spirit and reason, which strips these words of their ordinary signification, and makes them operate an unrestrained grant to the parent. The only ground on which this can rest is, that the half-sections and quarter-sections are added to enable the parent to discharge the burden of supporting children whom he was under a legal obligation to support. But the word *child*, whether taken in its legal or in its ordinary sense, means the lineal descendant of another in the first degree, and is equally applicable to persons over and under twenty-one years of age; yet there is no obligation on the parent to support a child over the age of twenty-one, and hence there can be no propriety in saying that the grant was to the parent to enable him to discharge such obligation. Again, conceding that the word *child* was used as the synonym of *infant*, the provision made to the parent on account of a younger child, according to the reason contended for, should have been greater than that made on account of the older, because the burden of rearing and supporting the younger is greater than that of the older child. But the provision of the treaty is just the reverse; giving the half-section for the older, and the quarter-section for the younger child; thus showing that the grant was not intended as a bonus to the parent on account of the burden imposed on him.

Again, five years residence by *them*, meaning parent and children, is essential to a consummation of the conditions of the 14th article. If the word *child* be limited to include

those only who were under the age of twenty-one, this period of five years would nevertheless, in many instances, extend far beyond the majority of the children; and yet the parent loses control over the child when the latter attains his majority. This would be to make a grant to the parent on a condition which he cannot see performed—to annex a condition to a grant impossible of performance by the grantee. Residence being the condition to be performed, the power to perform or to omit the condition must be in him who is to take. The thing to be rendered is in the nature of personal services, and the reward for the render goes with the services—the benefit accrues to him from whom the consideration moves—each is responsible for the consequences of his own action. It must be remembered, too, that this residence must be with the intention to become citizens, which, being purely a matter of will, must be personal to the one exercising that will. The design of the treaty being to make permanent citizens of all who remained, the greater pecuniary inducement was necessarily held out to the older child, who would be less under the influence of his parent than the younger, would feel more keenly the loss of early ties and association, and would be more loth to abandon savage life, and to become amenable to the laws and customs of civilized life. And the additional provision of the article, requiring that the locations of the children should adjoin the location of the parent, seems to have been expressly designed to further the wish of the government that all the reservees should become good and contented citizens. If the interest of the parent alone had been consulted, his choice of location would have been enlarged as much as possible; but the interest of the child required that, in order to lessen the discontent and indisposition to remain after the removal of the tribe, so natural a result of his new condition, he should be placed in close proximity to the parent.

This construction of the 14th article is strengthened by a consideration of the provisions of other articles of the treaty. The 19th article secures reservations to the heads of families for improvements made by them; showing

that the grant, when made in consideration of services performed by the parent alone, is to him directly without regard to his children. The 17th article provides for an annuity, to be "divided and arranged to such as may not receive reservations under this treaty;" that is, to *all* such, or at least all such as were twenty-one years old at its payment. This article evidently divides the whole tribe into two classes, annuitants and reservees; all are annuitants except reservees, and all reservees who are not annuitants. The other provisions of the treaty, respecting the mode of payment of this annuity, show that it was intended only for those members of the tribe who removed west of the Mississippi; and such has been the constant practical exposition of the treaty by the government in the disbursement of the annuity. If, then, the children of those who remain, although they render the consideration on which the grant of the half-sections and quarter-sections is made, are not entitled to these reservations, it follows that they alone, of all the tribe, lose everything under the treaty, and get nothing in return; for young and old share equally in all the benefits secured by the treaty to those who emigrate.

The appellant relies on the practice of the government in issuing patents under this article of the treaty, as conclusive of the question of construction. This practice amounts to nothing more than this: the agents of the United States, through ignorance or indolence, omitted to take down the names of the children of the locating parents; and the secretary of war, not having their names, did not issue the patents to them. When a treaty requires some further act by the government to give it effect, the action of the government in that particular may be some clue to its construction; as in the payment of the annuity above referred to. But, when a right is defined and made perfect by the treaty, the subsequent conduct of the government can no more be a guide to interpret it, than the assertions of the grantor, made after his deed has passed, can be received against the grantee in aid of the construction of the deed. The treaty itself determines the rights of the parties under it, and is



the supreme law of the land; and to the judiciary alone belongs the power to construe it. The treaty itself fixes the grant, and the patent is merely the evidence that the terms have been complied with. If the patent had never issued, the rights of the parties would have been the same. But the treaty does not designate the particular lands to which each reservee may be entitled. That requires the subsequent act of severance of the land from the public domain, and conveyance of the legal title by patent. Hence, the complainants, being reservees but not patentees, cannot maintain ejectment, but must assert their rights in equity.

2. The allegations of the appellant's answer are not sufficient to entitle him to protection as a purchaser for valuable consideration without notice. Moreover, on the agreed facts, he is chargeable with implied notice of the complainants' rights, because the patent to Thomas Hall, conveying to him 2240 acres, shows on its face that it was issued under the 14th article of the treaty.—2 Sugden on Vendors, 293-4; *Johnson v. Thweatt*, 18 Ala. 747; *Brewer v. Brewer & Logan*, 19 Ala. 487; *Center v. P. & M. Bank*, 22 Ala. 755; *Vattier v. Hinde*, 7 Peters, 271; *Kennedy v. Green*, 3 My. & K. 699.

R. W. WALKER, J.—This case involves the construction of the 14th article of the treaty between the United States and the Choctaw Indians, concluded at Dancing Rabbit creek, 15th September, 1830. That article is in the following words:

“Each Choctaw head of a family, being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty; and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age, and a quarter-section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside

upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case, a grant in fee simple shall issue. Said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen; but, if they ever remove, are not to be entitled to any portion of the Choctaw annuity."—U. S. Statutes at large, 7th vol., p. 333.

William Hall was the "Choctaw head of a family," and, at the date of the treaty, had living with him seven children, of whom three were over, and four under, the age of ten years. In pursuance of the article above quoted, he claimed as his reservation three and a half sections of land, including the section on which he lived; and in making his claim, he reported to the agent of the United States (according to what is shown to have been the general practice in executing this article of the treaty) the number and ages, but not the names of his children. By virtue of the claim thus made, he secured a reservation of three and a half sections. No question arises in this case as to the title to the section on which Hall was living when the treaty was concluded. But in reference to the remaining two and a half sections embraced by the reservation, the question is, whether, under the treaty, Hall took them absolutely for himself, or whether his children living with him took legal or equitable estates therein which he could not convey.

If, under the treaty, an interest vested in the children, it is not necessary for us to decide whether the grant was meant to be directly to them, or to the parent in trust for them. In either event, the result, so far as the decision of this case is concerned, is the same.

It must be admitted, that the language of the treaty, and especially of this particular article, is clumsy and inartificial. We do not, however, concur with Mr. Attorney-General Legare, in the remark made by him in the opinion which is embodied in the transcript, that "the words are so extremely doubtful, as to be susceptible of either of the conflicting constructions insisted on."—At-

torney-Generals' Opinions, vol. 4, p. 107. The doubt we entertain is rather as to the nature, than the existence, of the right of the children. The article first provides, that the head of the family, who signifies his intention of becoming a citizen, "shall thereupon be entitled to a reservation of one section." It then proceeds—"In like manner shall be entitled to one-half that quantity, for each unmarried child living with him over ten." The word *for*, as here employed, if there were nothing in other parts of the article or treaty to explain it, would certainly be somewhat equivocal. Ordinarily, a grant to one, *for* another, creates a trust. But this particular grant follows, in immediate succession, a grant to the head of the family, which, it is admitted, is for himself absolutely; and the words here employed might, if unexplained, seem to indicate a mere enlargement, or extension, of the interest already granted. "*In like manner, shall be entitled,*" &c. If these terms stood alone, or in connection only with the preceding part of the article, there might be some force in the argument, that *for*, as here used, means simply by reason, or on account of, and was intended to designate the child as the cause of an additional reservation to the parent, and not as the recipient of a distinct reservation for himself. But the words which immediately follow, shed light upon this obscure expression, and sufficiently indicate the sense in which it was employed. "And a quarter-section *to* such child as may be under ten." Here are words which admit of but one construction; and that is, that the child is the person entitled to the benefit of the reservation. This is made still more plain by the words which designate the locality of the reservations granted to or for the children. They are to "adjoin the location of the parent." What is the location of the parent? Obviously, we think, the section on which his 'improvement' is situated, and which is reserved for him in absolute right. The reservations of the children were to adjoin the location of the parent; and it is certainly a fair argument, that lands which were to adjoin the parent's can hardly be deemed lands of the parent.

This construction of the 14th article derives powerful



support from the 6th clause of the 19th article, which provides, that "children of the Choctaw nation residing in the nation, who have neither father nor mother, \* \* \* shall be entitled to a quarter-section of land, to be located under the direction of the president; and with his consent, the same may be sold, and the proceeds applied to some beneficial purpose for the benefit of said orphans." Thus it will be seen, that adopting the construction of the 14th article which we have indicated, the treaty secures reservations to all the children of the tribe; and the result is that equal distribution of favors which seems to have been one of the main purposes of the treaty. Upon the opposite construction, the treaty has designated a favored class of children, and confined the direct benefits which it bestows to them exclusively.

The design of the treaty was to make permanent citizens of those of the tribe who should remain in the States; and for this purpose, a bonus, in the shape of a reservation of land, is provided for all who continue to reside in the ceded territory with that intention. The contentment and comfort of the families remaining would obviously be promoted, if the possessions of the parent and his children should be near each other. The provision that the reservations should adjoin is altogether consistent with the idea, that a part of the reservations were to belong to the children; for the proximity of the lands to those of the father, would tend to keep them contented, and increase the probability of their becoming permanent citizens. Upon the supposition that the additional reservations were for the children, we can perceive a substantial reason for the provision, that they should adjoin the location of the parent. On the other hand, if all the reservations were for the parent exclusively, the benefit conferred would have been enhanced by allowing him a larger choice of location.

Other articles of the treaty confirm the idea, that the advantages secured by it to the Indians were not intended exclusively for adults, but that the interests of the children of the tribe were especially contemplated. Notice particularly the stipulations contained in the 20th article,

for the education by the United States of Choctaw youths, for the erection of school-houses, and for the annual payment of a sum for the support of teachers.

[2.] We do not perceive the force of the argument attempted to be founded on the construction which seems to have been given to this article of the treaty by the secretary of war, and the form of the patents which were issued by the government in carrying it into effect, until a different form was prescribed by the act of 23d August, 1842.—5 U. S. Statutes at large, 513. Treaties are themselves the supreme law, and neither the legislative nor the executive department can settle legal rights arising under them. No proposition can be plainer, than that rights which are defined by, and have vested under a treaty, can neither be defeated nor impaired by an act of congress; much less by any practice adopted by the officers of government in executing the treaty. The government, and the agents of the government, are alike powerless to affect rights which have been granted by treaty. When, therefore, a case arises between individuals, involving rights growing out of a treaty, those rights are to be determined upon a judicial construction of the treaty; and this is to be settled by reference to its words and expressions. The practice of the war department, and the form in which the patents were issued, cannot change the meaning of the words, or control us in interpreting them.—*Pickens v. Harper*, 1 Sm. & Mar. Ch. 540; *Attorney-Generals' Opinions*, vol. 4, 107.

Our conclusion is, that it was the purpose of the treaty to make substantive and distinct provisions for the children; and that a single section of land (the one on which his improvement, or a part of it was situated) was the extent of the reservation to which the father was entitled for himself. We are supported in this construction by the opinion of the court in *Pickens v. Harper*, 1 Sm. & M. Ch. 539; see, also, *Newman v. Harris & Plumer*, 5 How. Miss. 564.

[3.] But, though the treaty is the paramount evidence of the rights secured by it, uncontrollable by any subsequent act or practice of the government or its officers;

still, it gives a mere inchoate title to land not severed from the public domain, or so designated as to be susceptible of identification. More than one head of a family might reside on the same section. The child's land is to adjoin the location of the parent, but on which side the treaty does not determine. The treaty, therefore, only establishes the existence and extent of the right, but does not designate the particular land. This designation of the particular land was to be by subsequent proceeding, and the title thereto conveyed by grant in fee simple. While, then, the treaty gives the right, it is the patent which conveys the title.—See *West v. Cochran*, 17 How. U. S. 403; *Opinions of Attorney-Generals*, vol. 3, p. 49.

[4.] In this case, the patent being “to William Hall and his heirs,” conveys to him a legal estate in fee simple. But, inasmuch as the form of the patent cannot destroy the rights which vested under the treaty, the legal title which it conveys will be decreed by a court of equity to be held subject to these rights, and in trust for the persons to whom the land was intended to be secured by the treaty. The legal title being thus in the patentee, and not in the reservees, (the children,) the latter could not maintain ejectment for the recovery of the land, and their only remedy is in a court of equity.—See opinion of Attorney-General Legare, (*Opinions of Attorney-Generals*, vol. 4, p. 107;) *West v. Cochran*, *supra*; *Cousin v. Blanc*, 19 How. 202; *Ballance v. Forsyth*, 13 How. 18.

[5.] It is alleged in defense, that the defendant is a purchaser for valuable consideration without notice. The answer of the defendant shows, that when he made the purchase from Hall, he knew that Hall was the “Choctaw head of a family,” and that his right to the land was claimed as having arisen under the treaty. It is well settled, that if the purchaser be put in possession of such facts concerning the title which the vendor offers to sell, as would cause a prudent man to inquire further before he would proceed with the purchase, he cannot claim the protection which is accorded to an innocent purchaser without notice.—*Center v. P. & M. Bank*, 22 Ala. 755; *McGehee v. Gindrat*, 20 Ala. 101. Information which



makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry, if conducted with ordinary diligence and prudence, would have led.—Carr v. Hilton, 1 Curtis, C. C. R. 390; Ringgold v. Bryan, 3 Md. Ch. 488; Wilson v. McCullough, 11 Harris, 440; 1 Smith, N. Y. 354; Kennedy v. Green, 3 My. & K. 699. A purchaser has notice of what appears upon the face of every title-deed which constitutes a necessary link in his chain of title, and will not be allowed to deny notice by asserting that he had not read the deed.—Johnson v. Thweatt, 18 Ala. 747; Wailes v. Cooper, 24 Miss. 208; Tiernan v. Thurman, 14 B. Monr. 277. In the language of Lord Mansfield, “whoever wants to be secure when he makes a purchase, should inquire after and examine the title-deeds.”—Kuck v. Hall, Dougl. 22. The defendant knew that the source of his vendor’s title was the treaty. This treaty was the public law, with the provisions of which every citizen is presumed to be acquainted. Even if such were not the presumption, the defendant being informed that his vendor’s title was derived from the treaty, it was his duty to examine it. Such an examination would have informed him that the right of Hall was confined to the single section on which his improvement was situated, and that all the rest of the land was for his children. If, then, the defendant was not in fact cognizant of the rights of the complainants, his want of knowledge was the result of his failure to make an inquiry which it was his duty to make, and a court of equity will treat him as if he actually had notice.—McGehee v. Gindrat, 20 Ala. 100; Herbert v. Hanrick, 16 Ala. 597.

The decree is affirmed.

HOLTZCLAW *vs.* WARE.

[APPEAL FROM ORDER FOR REMOVAL OF EXECUTOR.]

1. *Limitation of appeal.*—Five days is the limitation of an appeal from an order of the probate court removing an executor on account of his failure to give bond when required, (Code, § 1888;) and if an appeal is taken after the expiration of that time, the appellate court will dismiss it *ex mero motu*, without any objection on the part of the appellee.

## APPEAL from the Probate Court of Montgomery.

IN this case, Charles T. Pollard, James T. Holtzclaw and N. W. Cocke, executors of the last will and testament of Thomas M. Cowles, deceased, who were relieved by an express provision in their testator's will from giving bond for the faithful discharge of their duties as such executors, were required by an order of said probate court, granted on the application of one Robert J. Ware, a creditor of the estate, to give bond with sureties, in the penal sum of \$1,000,000, by the 15th September, 1857. Pollard gave bond within the prescribed time, and Cocke resigned his trust; and Holtzclaw having failed to give bond as required, his letters were revoked by the court on the 25th September, 1857, and Pollard was appointed sole executor. From this order of removal, on the 3d March, 1858, Holtzclaw sued out the present appeal, and here assigned said order as error; and there was a joinder in error by the appellee. On this state of facts, George Goldthwaite, as *amicus curiæ*, moved to dismiss the appeal, on the ground that it was barred by the statute of limitations.

GEO. GOLDTHWAITE, for the motion.

JNO. A. ELMORE, *contra*.

A. J. WALKER, C. J.—The appellant took his appeal in this case from an order of the probate court removing him as executor. This appeal was taken after the expi-

ration of five days, the time allowed for taking an appeal under such an order. The appellee makes no motion to dismiss the appeal, and we have no evidence that he desires a dismissal. Our attention has been called to the subject by the motion, in open court, of counsel representing neither of the parties. We assert, and will endeavor to maintain, that it is the duty of the court, when it perceives that this appeal is thus taken after the expiration of the prescribed period, to dismiss it.

The third subdivision of section 1888 of the Code restricts the right of appeal from an order removing an executor, to a period of five days after such order. It is certain that this law presents a fatal objection to the consideration of an appeal not taken within the prescribed time, whenever the authority of the court is legally brought to bear upon the objection. The statute makes no express command as to the manner in which the court may be moved or incited to action upon the subject. The statute does not, in terms, affirm or deny that the court must take cognizance of the defect in the appeal, only upon the motion of the appellee; nor does it expressly affirm or deny that the court may act upon its own suggestion in reference to such defect. Finding in the statute no expressly prescribed rule, we must seek for a guide to our decision in the principles of the common law, and in the spirit and purpose of the statute.

If this court can only dismiss an appeal from an order removing an executor, upon the motion of the appellee, it is in the power of the appellee to waive the objection; and indeed, the enforcement of the limitation is absolutely subject to the discretion of the appellee, so that the power of the court *ex mero motu* to dismiss such an appeal, depends upon the question of the appellee's right to waive the objection. A party may certainly waive that which is for his benefit. "*Regula est juris antiqui, omnes licentiam habere his, quæ pro se introducta sunt, renunciare.*" But that which is not prescribed peculiarly for his benefit, he can not waive. For example, a foreign consul cannot waive his privilege of exemption from suit in a state court, because it is conferred on account of his government.—Davis



v. Packard, 7 Peters, 284. One man can never, upon any principles of justice, be permitted to dispense with the obligations of a rule, which, though affording protection and security to him, is especially designed to benefit others, and to guard interests in which he may have but a slight participation, and which he is not bound as a trustee or otherwise to protect. If, then, it can be demonstrated that the especial and peculiar purpose of the statute above named was to protect interests other than those of the appellee, and for the protection of which there is no guaranty in the liability of the appellee as trustee or otherwise, the inference must be, that the appellee can not waive the objection to this appeal, that it was not taken within the prescribed time.

To the statute of limitations which we are now considering there are no exceptions of coverture or infancy. This fact, together with the extreme brevity of the period allowed for taking the appeal, is entitled at least to some weight in an argument that the legislature, in prescribing the time, did not exclusively consult the interests of the immediate parties, but looked beyond them, to the interests of others which might be affected, and aimed to establish an unbending rule which would protect them. But we draw our argument chiefly from the sections of the Code which direct the penalty, condition and effect of a bond given upon obtaining an appeal from an order removing an executor.—Code, §§ 1895, 1896. The appeal bond is required to be in an amount not less than the appellant's bond as executor, and to be conditioned to prosecute the appeal to effect, and, until the appeal is decided, to discharge faithfully his duties as executor. The bond suspends the order of removal, restores the executor to his trust, and operates as a security for the faithful discharge of his executorial duties pending the appeal. The appeal virtually makes a representative of the estate, and in the bond gives a security for the administration. Every person interested in the estate has, therefore, an interest in the appeal; and it is manifest that those interests were looked to in the regulations prescribed. If the party upon whose motion the executor

is removed, and who is the appellee in the appeal, can waive the statute of limitations, he could waive the bond; and he might thus deprive those interested in the estate as legatees, distributees, or creditors, of a security provided for their protection. Again, if the parties to an appeal can, after the expiration of the period of limitation, have an appeal. it would result, that a removed executor or administrator could, after his successor (the appeal being considered as barred) had been appointed, and had qualified and entered upon the discharge of his duties, oust such successor without his consent, and against the wishes and interests of the many persons besides the appellee interested in the appeal. Furthermore, the parties to an order of removal might, after the bar was complete, reinstate an executor removed for imbecility or embezzlement, and contrive to so delay the trial of the appeal as to retain such a trustee in office for an indefinite time. And lastly, the period of five days, so unusually brief, has been prescribed evidently because the interests of legatees, distributees and creditors, required that the question of a right to the representation of the estate should be speedily settled; and this purpose of the law-maker utterly fails, if it is in the power of him who makes the motion for removal at any time to allow an appeal, and then continue it *ad libitum* in the supreme court.

It must be admitted, that the statute of limitations to writs of error and appeals, where there are exceptions such as infancy and coverture, must be pleaded, in order that the appellee or defendant in error may reply.—Brooks v. Norris, 11 How. 204; 2 Tidd's Practice, 1141; Higgs v. Evans, 2 Strange, 837. But the law which we are considering is peculiar, and the statute prescribing the time within which the appeal may be taken, unlike other statutes of limitations, indicates a legislative intention to guard and protect interests and rights of persons not parties to the appeals. Believing that the legislature never designed, in fixing the period of limitation to this appeal, to make the enforcement of the law optional with the parties, it is our duty to adopt the proper means for carrying out the intention of the legislature. We hold,

therefore, that it is not only the province, but the duty of this court, whenever its attention is in any wise called to the fact that the appeal was taken after the prescribed time, of its own motion to dismiss it.

We do not consider *Lea v. Thompson*, 28 Ala. 453, as an authority opposed to our conclusion. That decision was made in reference to the securities provided for the benefit of the appellee, which he, of course, may waive.

The appeal is dismissed, at the costs of the appellant.

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SADLER *vs.* LANGHAM.

MOORE *vs.* WRIGHT & RICE.

[APPLICATIONS FOR ESTABLISHMENT OF PRIVATE ROAD AND MILL-DAM.]

1. *Constitutionality of statutes authorizing establishment of private roads and erection of mill-dams.*—The several statutes of this State, authorizing the establishment of private roads across the lands of third persons, (Code, §§:187–88.) and the condemnation of their lands for the erection of mill-dams, (§§ 2089–2105,) are unconstitutional, inasmuch as they authorize the taking of private property for other than public uses; and the fact that such statutes have long been in existence is not a sufficient reason why the courts should not now declare them unconstitutional.

THESE two cases were argued and submitted separately. The former was brought up by appeal from the circuit court of Greene, and was there tried before the Hon. JOHN GILL SHORTER; the latter was an appeal from the probate court of Lauderdale. The material facts shown by the record in each case are as follows:

At the regular November term, 1855, of the court of county commissioners for Greene county, Mitchell M. Langham and nineteen other citizens of the county presented their petition, asking the establishment of a private road, “leading from the Erie road north to the Hester road, on the section line between William G. Sadler and said M. M. Langham.” The establishment of this



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Sadler v. Langham, and Moore v. Wright & Rice.

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road was contested by said Sadler, through whose lands the route of the proposed road lay. At the regular May term, 1856, the following judgment was rendered by said commissioners' court: "It is therefore ordered, adjudged and decreed, that the report of the jury of review be, and the same is hereby, ratified and confirmed; and that the said applicants are entitled to the right of a private road, as therein set forth and more particularly described, to-wit," &c., (describing the road;) "and it is further ordered, that the said road be, and the same is hereby, established as a private road in said county, upon the following terms, provisions, and conditions—that is to say, that said private road shall not be opened until after the 10th day of July, 1856, nor until the present growing crop on the lands of W. G. Sadler and Rachel Day are gathered; nor shall the parties have a right to open said road until they shall have first executed a bond, with at least two good sureties, in the penal sum of \$2,000, payable to W. G. Sadler and Rachel Day, between and on whose lands said road as marked out will run, conditioned to pay them such damages as they may sustain and show they have sustained by reason of opening said road in the manner provided by law."

After the rendition of this judgment, the contestant applied to a circuit judge, by petition, for a *certiorari* and *supersedeas*, to remove the proceedings into the circuit court, and to restrain further action under the order of the commissioners' court; assigning as error on the record returned to the circuit court, in addition to several particular informalities in the proceedings, that the judgment was based on such conditions as made it void, and that the statute authorizing the establishment of private roads by order of the commissioners' court was unconstitutional and void. On the hearing of the case in the circuit court, that court dismissed the *certiorari*, and rendered judgment for the costs against Sadler; and its judgment in that behalf is here assigned as error.

In the other case, the proceedings were commenced by petition by James Wright and W. F. Rice, asking the

probate court of Lauderdale to grant an order authorizing the erection of a mill-dam by them, and to issue a writ of *ad quod damnum* to ascertain the damages thereby caused to the owners of the lands on which one abutment of the mill-dam would rest. The petitioners alleged, that they were citizens of said county of Lauderdale, and had erected on a certain creek in the county a foundry, machine-shop and grist-mill, propelled by water; that they were the owners of the lands on which the foundry was erected, and through which the race ran for supplying the machinery and grist-mill with water; and that the lands on the opposite side of the creek, on which they proposed to abut one end of their mill-dam, were claimed by Lewis C. Moore and his wife, whom they prayed to be made parties defendant to the petition. The court granted the writ of *ad quod damnum* as prayed for, directing the summoning of a jury as provided by the statute; and Moore and wife were served with a copy of the petition, and notified of the time and place for the meeting of the jury. At the next term of the court, to which the inquest of the jury was returned, Moore and wife appeared, by attorney, and moved to quash the proceedings on account of certain specified defects in the petition, the writ of *ad quod damnum*, the summoning of the jury, and the execution of the writ. The court overruled all their objections to the regularity of the proceedings, and rendered judgment in favor of the petitioners, in these words: "It is therefore considered and ordered by the court, that said Wright & Rice, the plaintiffs in this cause, have the right, and that they be permitted to erect a dam across Cox's creek, at the place designated in the report and inquest made by the jury, to the height of three and a half feet from the surface of the water, and to abut their dam on the land owned by Lewis C. and Atlantic Moore, as marked out in the inquest of the jury appointed and summoned by the sheriff in said cause. It is further ordered, adjudged and considered by the court, that said Lewis C. Moore and Atlantic Moore pay the costs incurred in this proceeding, and that the plaintiffs recover of them their costs in this behalf expended. It is further

ordered, that the plaintiffs pay to the defendants the sum of twenty-five dollars, the amount assessed by the jury for said acre of land." The defendants reserved exceptions to the overruling of their several motions and objections, and they now assign the same as error, together with the rendition of judgment for the plaintiffs.

D. W. BAINE, with whom were J. D. WEBB and R. F. INGE, for the appellant Sadler, made the following points:

1. The legislature has no power to take the property of one man by any legislative act, without his consent, and give it to another.—Wilkinson v. Leland, 2 Peters, 657; Taylor v. Porter, 4 Hill, 144; *In re Albany Street*, 11 Wendell, 149; Bloodgood v. Mohawk R. R. Co., 18 Wendell, 59; 19 Wendell, 659; 5 Paige, 137; Clack v. White, 2 Swan, 540; Ten Eyck v. Delaware Canal Co., 3 Harr. 200; Embury v. Conner, 2 Sandf. (Sup. Ct.) R. 106; *Ex parte* Martin, 8 English, 198; People v. White, 11 Barbour, 30.

2. A statute, authorizing a private road to be opened through one man's land, for the benefit of another, is a taking of property for private use, within the meaning of the above rules.—Taylor v. Porter, 4 Hill, 144; Clack v. White, 2 Swan, 540. A private road may be laid out, under a statute similar to section 1187 of the Code, without any regard to public convenience.—Pettengill v. County Commissioners, 8 Shep. (Me.) 380. Such a road may be laid out in such a way that the public could not use it, as where the entire road was on private property. Reynolds v. Reynolds, 15 Conn. 97. The utmost that has ever been contended, in favor of the power of the legislature over private property, is, that the use may be considered public if a portion of the public have an interest in the appropriation.—Newcomb v. Smith, 1 Chandler's (Wis.) Rep. 77; Hartwell v. Armstrong, 19 Barbour, 168. If our statute is valid at all, it authorizes a road to be laid out upon the land of another, where the public does not need it, where the public cannot use it, and where the sole benefit will be individual. It forbids an inquiry into the question of public convenience or neces-



sity. If it be conceded that the public might use such a road, the concession could not aid this law, because the public use is not the consideration in establishing the road. The public may use a hotel when erected, and its erection may be a public convenience; yet the legislature certainly could not take one man's land, and give it to another, for the erection of a hotel. While each citizen holds his property in subordination to the right of eminent domain existing in the State, and must yield it up in obedience to that right when required by public convenience or necessity, he is not bound to yield it up for a use which is not pronounced public by either the legislature or the courts; and after his property has been taken professedly for the benefit of an individual, it is no answer to him to say that the public may share in the enjoyment of what was thus taken. If the public necessity is strong enough to demand his property, let it be taken on that ground, and he must be content; but, when the public benefit is too weak to demand it, and it is taken solely because individual convenience requires it, it is a mere mockery to tell him that his property has been taken for public use.—Harding v. Goodlet, 3 Yerger, 53.

3. A private road, granted under the Code, cannot be used by the public as a matter of right. There is no distinction between such a private road and a private road obtained by grant or prescription; and it is settled, in case of the latter, that trespass would lie against a stranger for entering upon the road.—Commonwealth v. Low, 3 Pick. 413. The statute authorizing the road confers upon the public no right to use it. The provision requiring the road to be opened and kept in repair by the person on whose application it is established, without exemption from work on public roads, is but an affirmation of the common-law rule as to other private roads. No action or indictment would lie for the failure to open or repair the road.

4. As to the want of "just compensation," see Thompson v. Grand Gulf R. Co., 3 How. (Miss.) 240; 1 Baldwin, 205.

5. The case of the Pocopson Road, 16 Penn. St. R. 17,

is founded on *Harvey v. Thomas*, 10 Watts, 66, which holds, that private property may be taken for private use without compensation. This is so palpably wrong, and so directly at war with all the adjudicated cases, that no argument is required to answer it.

WM. P. WEBB, with whom was WM. E. CLARKE, *contra*:

1. The private-road law stands upon the same authority and principle as the public-road law, and differs from it only in name.—*Perrin v. Farr*, 2 Zab. (N. J.) 356; *Harvey v. Thomas*, 10 Watts, 63; also, Judge Nelson's dissenting opinion in *Taylor v. Porter*, 4 Hill, 150.

2. The assumption that, in case of a private road, private property is taken for private use, is a mere *petitio principii*. On the contrary, every person may use such private road, and it is as much open to the use of the public as to the man on whose application it is granted, who himself uses it in the discharge of public duties. 2 Stew. & Porter, 202; and authorities above cited.

3. Although it is called a private road, it is only an easement. It does not divest the right or title of the owner of the fee.—*Perley v. Chandler*, 6 Mass. 454; *Angell on Ways*, 2; 2 Stew. & P. 214; 2 Gilman, 238; 5 Gill, 389.

4. The right of eminent domain belongs to the State, and authorizes her to provide roads for the use of her citizens, particularly where they are required to perform public duties, as to muster, vote, work on roads, serve on juries, &c.—Judge Nelson's opinion in 4th Hill, *supra*; also, *Young v. Harrison*, 6 Geo. 146.

5. The right to establish roads, public or private, cannot be determined or measured by the number of persons, or the extent of their use. It is enough if the public may use the road: that makes it public, although applied for as a private road; and as the public good or benefit requires that a man shall perform public duties, the legislature is the sole judge of the expediency of the act. 2 Stew. & P. 211; 2 Gilman, 238; *Angell on Highways*, p. 61, § 84.

6. The case of *Taylor v. Porter*, 4 Hill, cited by appel-

lant, does not apply to the case at bar; because the New York statute, unlike ours, vested the fee in the grantee, his heirs and assigns. Nor does the position taken by Judge Bronson in that case—that the act was unconstitutional because the compensation was not assessed by “due course of law”—apply to this case.—2 Stew. & P. 218, where the right of way, taken for a railroad, was compensated in the same way, and it was held valid. And all the cases in which railroads have been established, (cited in 5 Paige, 137, and 18 Wendell, 45,) proceed on the principle that compensation may be made in this way.—See *Young v. Harrison*, 6 Geo. 146.

7. The case of *Harding v. Goodlet*, 3 Yerger, 52, was an application for a grist-mill, saw-mill, and paper-mill; and the court said, that the proceeding was unauthorized, because the saw-mill and grist-mill are used for private interests alone. But the court also decided, that the law condemning land for a grist-mill was not unconstitutional. As to the expediency and extent of the exercise of the right of eminent domain in such cases, see 3 Paige, 73.

8. As to the sufficiency of the compensation, and the mode of estimating the damages, see 4 Litt. 328; 1 Marsh. 85; 3 Paige, 45; 5 Paige, 137; 5 Blackf. 386; 8 Wendell, 85; 18 Wendell, 1.

9. In a doubtful case, the courts will not declare a law unconstitutional.—6 Cranch, 128; 1 Cowen, 550.

R. W. WALKER, for the appellants, Moore and Wife :

1. In all cases, where the private property of a citizen is taken from him without his consent, the record should affirmatively show that it was so taken for a public use; for, unless it was taken for a public use, the proceeding is unauthorized and void. But the record in this case nowhere shows that the dam sought to be erected was intended to subserve any public use. The petition states, that the petitioners “have now in operation a foundry, machine-shop, and grist-mill;” but it does not disclose what kind of foundry, machine-shop, or grist-mill. Even if foundries, machine-shops and grist-mills can ever be



considered public uses within the meaning of the constitution, (and it is submitted that they cannot be so considered,) they may nevertheless be obviously designed for private uses merely. For aught that appears in the record, the private property of the appellants has been condemned for the private uses of the appellees. The judgment simply shows that private property has been taken, but nothing more. No proceeding can be sustained on the doctrine of eminent domain, unless these two things are distinctly shown by the record: 1st, that the property was taken for a public, and not for a private use; and, 2d, that due compensation to the owner has been provided for.

2. Admitting that the dam is shown by the record to have been authorized for a public use, it is submitted that the statute, under which the proceeding was had, is unconstitutional. Section 2089 of the Code seems to contemplate the erection of dams for any purpose. On the supposition that it is to be so construed as to authorize the erection of dams only for the purposes designated in section 2090, namely, for "mills or other machinery;" still, this law, on its face, authorizes dams to be erected with the view of running any kind of mill, or any kind of machinery. Under this law, the man of wealth and taste could erect a dam, first condemning his neighbor's property therefor, for the purpose of adorning his grounds with fountains; a planter could build a dam with the view of running his cotton-gins by water power, or for the purpose of sawing lumber to build negro-cabins, or to make fences, exclusively for his individual use and benefit. It is impossible to sustain such a law as constitutional. A statute which seeks to enforce the right of eminent domain, must designate and define the particular public uses for which the property of the citizen may be taken. If its terms justify a taking for private as well as public uses, it is unconstitutional and void; unless, indeed, it be so framed that the clause which allows the taking for private use is distinct and separate from that which authorizes it for the public use. The words of this statute are not susceptible of any such division or separa-

tion. The same words authorize one man to condemn private property for a public grist-mill; and another to condemn it for a private saw-mill, or for any other kind of mill or machinery for his individual use and benefit. The words which justify the taking for public use, and those which allow it for private use, are identical and indivisible; and the entire act is, therefore, unconstitutional.—Pettit's Adm'r v. Pettit's Distributees, 32 Ala. 288, and authorities there cited; Mobile & Ohio R. R. Co. v. The State, 29 Ala. 584, and authorities cited. If the terms of the statute embrace private as well as public uses, and are indivisible, the whole act is as completely void as if it failed to provide for compensation to the owner; for both of these conditions (compensation and public use) are "inseparable attendants" upon the exercise of the right of eminent domain.

That an act which fails to provide for compensation to the owner, is void, see Sedgwick, 515, 526; Embury v. Conner, 3 Comstock, 511; Taylor v. Porter, 4 Hill, 140; 3 Paige, 73; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wendell, 9, 59; Brewer v. Duncan, 9 Geo. 37; Cushman v. Smith, 34 Maine, 247; 19 Barb. 118; 18 Pick. 501; 2 Kent, 339-40, and notes. "If the government authorizes the taking of property for any other than a public use, or fails to make provision for compensation, the act is simply void."—2 Gray's (Mass.) R. 9, 37. The act must "declare a public use."—Lumbard v. Stearns, 4 Cushing, 60.

No instance has been found, in which an act of the legislature, taking private property, has been sustained, unless it was disclosed upon the face, and by the terms of the act, that the use was a public, and not a private one. Here the terms are, "mills or other machinery;" but what sort of mills, or what kind of machinery, is not specified. The public has no interest in a private mill, and takes no benefit from it; and yet it comes within the terms of the statute. A cotton-gin, which gins but one man's cotton; a saw-mill, which saws lumber for only a single plantation; a distillery, which corrupts a neighborhood, and destroys public morals,—are certainly not

public uses, yet each is as clearly embraced in the terms of this statute as a public grist-mill, or water-works designed to supply a city with water.

As to the constitutionality of this law, and that the uses declared in it cannot be deemed public, see Taylor v. Porter, 4 Hill, 140; Clack v. White, 2 Swan, 540; Embury v. Conner, 3 Comstock, 511; Ten Eyck v. Delaware Canal Co., 3 Harr. 200; 18 Wendell, 9, 16, 20, 59, 66; Harding v. Goodlet, 3 Yerger, 41, 53; Smith's Com. 495; Hay v. Cohoes, 3 Barbour, 47; Stowell v. Flagg, 11 Mass. 364.

3. But, conceding that a grist-mill, which is nowhere shown to be a public grist-mill, can be considered a public use; still this proceeding, which seeks the erection of a dam for the purposes of running a grist-mill and operating a foundry and machine-shop, cannot be sustained. An application for such complicated purposes, some of which are so clearly not public uses, must be refused *in toto*.—Harding v. Goodlet, 3 Yerger, 41, 53.

JNO. S. & E. W. KENNEDY, *contra*, submitted no brief or argument on the constitutional question involved.

STONE, J.—As the most material inquiry in each of these cases depends on the same questions, constitutional and statutory, we propose to consider them together. Justice R. W. Walker, being of counsel in one of the cases, does not sit in either.

In determining the nature of the intendments to be indulged in construing clauses of our written constitutions, the courts of the United States can derive but little aid from English decisions. This grows out of the fact, that with us, both the legislative and judicial departments are limited in their powers by the provisions of the local constitution; while in England, parliament is said to be omnipotent, save as that body feels itself under the moral restraint of certain political axioms, much less comprehensive than the provisions of the constitutions of this country.

Unquestionably, it is our duty to presume that the leg-



islature, in the enactment of any given statute, has not transcended its powers. This presumption is but the result of two maxims of the law, namely, *omnia presumuntur rite esse acta*, and *ei incumbit probatio, qui dicit*. In all cases, then, where the constitutionality of a statute is brought in question, the burden of proof is on him who asserts the unconstitutionality.

On the measure of proof necessary to set aside a statute as unconstitutional, the language of the adjudged cases varies. In some cases it is said, that the expressed will of the legislature ought not to be disregarded, unless the unconstitutionality be *clearly demonstrated*. In another case it is said, that we should not hold that the legislature had exceeded its power, *except in cases admitting of no reasonable doubt*.—See Fletcher v. Peck, 6 Cranch, 87; Morris v. People, 3 Denio, 381; DeCamp v. Eveland, 19 Barb. 81; Clark v. People, 26 Wm. 599. With due respect, we think this language entirely too strong. It indulges, in favor of legislative infallibility, the same strength of presumption as that which obtains in favor of innocence when the life or liberty of the citizen is jeopardized in the courts of criminal jurisdiction. Constitutional provisions are intended as a protection to life, liberty and property, against encroachment, intentional or otherwise, at the hands of the government. Had not the framers of our system of government supposed it possible that legislative bodies might fall into error, they would not, in their sovereign capacity, have adopted a written constitution, superior alike over themselves and the legislature. We cannot believe that construction a sound one, which indulges every reasonable presumption against the citizen, when the legislature deals with his rights, and gives him the benefit of every reasonable doubt, when his life and liberty are in jeopardy before the courts of the country.

A controlling purpose with the founders of our representative system, was to prevent abuse and oppression, by incorporating into the fundamental law a nicely adjusted system of checks and balances. Hence, they divided the government of Alabama, as of most or all of the other States, into three distinct departments; and confided each

department to a separate body of magistracy.—Cons. of Ala., art. 2, § 1. Each of these bodies is, separately and for itself, charged with the protection and preservation of the inalienable rights of the citizen; and while we freely concede that it is the duty, and doubtless the pleasure of each, to presume that the others will keep within the bounds of constitutional authority, yet that presumption is not conclusive; nor should we, in its indulgence, forget that there is committed to us, equally with the other departments, the trust of guarding and protecting the life, liberty and property of the citizen, as guarantied by the constitution.

The language employed by the court in *Lane v. Dorman*, 3 Scam. 238, expresses our views so exactly that we adopt them as our own. Speaking of the question under discussion, that court said: “Unless it *be clear* that the legislature has transcended its authority, the courts will not interfere.” This is little more or less than was said by this court in the case of *Haley v. Clark*, 26 Ala. 439. In considering the constitutionality of an act of the legislature, the question was, had the legislature attempted to exercise the pardoning power, which our constitution vests in the executive? We said, “If that purpose *appears* on the face of the act, courts could not do otherwise than declare it invalid.”

As a corollary to what is cited above from 3 Scammon, we hold that if it *be clear* that the legislature has transcended its authority, it is our duty to pronounce such act unconstitutional.

The main question, upon the discussion of which we are entering, brings up for decision the second clause of section 13 of the bill of rights, which forbids that “any person’s property be taken or applied to public use, unless just compensation be made therefor.” Most of the State constitutions in this confederacy contain a clause substantially like ours.—See them collected in Sedg. on Stat. & Con. Law, 495–6–7. Many decisions have been made, by different appellate courts, on the clause above copied, and much diversity of opinion will be found to exist in regard to several of its features. The following questions,

growing out of the language of this clause, have been much discussed:

1st. What is meant by the phrase, public use?

2nd. In what manner, and by whom, is the question whether or not the proposed use is public to be determined?

3rd. Must the compensation be paid before the property is taken, or may it be secured for after payment?

4th. The prohibition being only against taking property of another for *public use*, may it be taken for private use?

The first and second of the above questions are far the most important and difficult. Their difficulty is enhanced by the irreconcilable conflict observable in the adjudged cases, as mentioned above. We think, also, that the question is much embarrassed by the fact that, in some cases, there has been an apparent failure to observe properly the distinction between the *public use*, which is mentioned in the 13th section of our bill of rights, and *public services*, as found in the 1st section of the same instrument, which reads as follows: "No man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services." Section 13 authorizes the *taking* of property *from* the citizen, for the use of the public. Section 1 *limits* the power of the legislature, in *conferring* emoluments and privileges *upon* the citizen, to cases in which *public services* are rendered as an equivalent or consideration. In the one case, property passes from the individual to the public; in the other, from the public to the individual. In the one case, the legislature, representing the sovereignty, takes the property of the citizen without his consent—a mere exercise of the right of eminent domain; in the other, it grants to, or contracts with the citizen, itself being one of the parties to the contract. The one protects the private property of the citizen from oppressive seizure at the hands of the legislature; the other ties the hands of the legislature against a reckless and improvident bestowal of franchises and other emoluments within its gift. The one qualifies the *right* to take; the other, the *power* to give.



The constitutionality of private corporations is frequently subjected to the test furnished by the 1st section of the bill of rights. Charters for banks, insurance companies, railroads, and many corporations for commercial and manufacturing purposes, although conferring privileges not enjoyed by the citizens generally, have been pronounced constitutional, because of the *public services* which such corporations are supposed to perform. The *services* are the increased facilities to commerce, the employment given to labor, and the increase of public wealth, consequent upon the creation of such chartered companies.—See Daughdrill v. Ala. Life Ins. & Trust Co. 31 Ala. 91, 97–8; Curry v. Mutual Ins. So., 4 Hen. & Munf. 315; Aldridge v. Tus. R. R. Co., 2 S. & P. 211; Dartmouth College v. Woodward, 4 Wh. 637.

This principle may be stated in another form. Private charters are contracts, in the strict sense of that term. On the part of the corporators, the obligations tendered, to employ technical language, are expressed in the words, *facio ut des*. The legislative assent is, *do ut facias*. This being a concurrence of two minds, *aggregatio mentium*, constitutes a contract. The *public services* afterwards to be performed by the corporation, are the executory consideration. The charter granted by the legislature is the executed price of that executory consideration. Being a contract upon a consideration “deemed valuable in the law,” it follows that the courts of the country are clothed with no power to inquire into the adequacy of the consideration. Such contract can only be annulled and rescinded, by the consent of the parties, by a failure by the corporation to perform some condition of the contract, precedent or subsequent; or for fraud, perhaps, in procuring the charter. That the courts cannot pronounce on the adequacy of the consideration, or whether the public will be benefited by the services to be performed by the corporation, see authorities *supra*; and see Addis. on Contr., 11, 17; 1 Parsons on Contr., 361–2–3.

The constitutional question presented in the two records under discussion, arises in the construction of section 13 of the bill of rights. The phrase, public use, as we have

seen above, was inserted for an object entirely different from that which prompted the incorporation of that other phrase, public services. It is our purpose to show that it was employed in a sense equally different.

We do not attempt, nor should we be able if we did, to express all the *uses* which the law would pronounce *public*, under this section of the bill of rights. Some of the private corporations enumerated above, which rest their constitutional existence on the 1st section of the bill of rights, are declared, in many well considered opinions, to furnish to the public that *use* which, under section 13 of the bill of rights, justifies the legislature in conferring on them power to condemn private property for the promotion of their corporate purposes. Rail-roads, plank-roads, canals, &c., are of this class. This principle is too well settled to be now disturbed.—*Boston & C. R. Cor. v. S. & L. R. Co.*, 2 Gray, 1; *Bloodgood v. M. & H. R. R. Co.*, 18 Wen. 9; *Com. v. Breed*, 4 Pick. 463; *Backus v. Lebanon*, 11 N. H. 19; *White River T. Co. v. Vermont C. R. R. Co.*, 21 Ver. 590; *Young v. Harrison*, 6 Geo. 130; same case, 3 Kelly, 31; *Conwell v. Hagerstown C. Co.*, 2 Car. 588; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 294; *Doughty v. S. & E. R. R. Co.*, 1 Zabr. 442; *Swan v. Williams*, 2 Mich. 427.

The right of the public to have their grinding done at a public grist-mill, is also a *public use*, within the meaning of that term, which we have no disposition to gainsay. *Harding v. Goodlet*, 3 Yerg. 41; *Stowell v. Flagg*, 11 Mass. 364; *Boston & R. M. D. Cor. v. Newman*, 12 Pick. 467; *Burgess v. Clack*, 13 Ire. 109; *McAfee v. Kennedy*, 1 Lit. 92; *Smith v. Connelly*, 1 Mon. 58; *Shackelford v. Caffey*, 4 J. J. Mar. 40.

There are many other uses, obviously public, which every one will concede. Army supplies in time of war, public highways, sites for public buildings, streams and lands for an adequate supply of water for the use of a city, &c., are of this acknowledged class.—*Lumbard v. Stearns*, 4 Cush. 60; *Stein v. Burden*, 24 Ala. 130; *Benedict v. Goit*, 3 Barb. 459; *Burden v. Stein*, 27 Ala. 104.

The right to levy taxes, though regulated by constitu-

tional provisions, and the right to establish police and sanitary regulations, rest on a different principle. No pecuniary compensation is necessary to authorize the assertion of this class of rights. They are part of the price which the citizen pays to the government, for the protection which that government affords him.—Sedg. on Stat. and Con. Law, 501, *et seq.*

We will recur to this subject again.

How is it to be determined, when the legislature authorizes the taking of private property, whether or not the use is public within the 13th section of the bill of rights? We have shown the principle on which the right is vested in the legislature to decide, under section 1, what constitutes public services. That principle has no application here.

In Sedg. on Stat. and Con. Law, pp. 512, 513, is the following language: "As the power to take is universal, so it is absolute; that is to say, the legislature are the sole judges of the existence of the exigency which demands the sacrifice of the rights of individuals. 'I admit,' says Mr. Chancellor Walworth, 'that the legislature are the sole judges as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or of any particular section thereof.' 'It is the undoubted and exclusive province of the legislature,' says the supreme court of the State of Maine, 'to decide when the public exigencies require that private property be taken for public uses.'"

An examination of the very brief extracts by Mr. Sedgwick, from the opinions of Chancellor Walworth and the chief-justice of Maine, will show that he misapprehended what they had decided. The apparent import of Mr. Sedgwick's language, as we understand it, is, that the legislature are the sole judges of what is a public use, which will justify the taking of private property. He had advanced the same idea, though in different language, on page 511 of his work. Chancellor Walworth said, "The *expediency* of exercising the right of eminent domain, for the purpose of making public improvements," &c.



This language may be thus paraphrased, without changing its meaning: *The right of eminent domain, for the purpose of making public improvements, being clear, the legislature are the sole judges of the expediency of exercising this admitted right.* The case was one of undoubted public use, and the entire opinion of the chancellor shows that he was speaking of the expediency of exercising the right, and not of the right itself.—See *Varick v. Smith*, 5 Paige, 137, 160.

The case of *Spring v. Russell*, 7 Greenl. 273, 292, also cited by Mr. Sedgwick, arose under an act of the legislature, chartering a canal company. Under many decisions, this use was also public. The principle settled was precisely analogous to that declared by Chancellor Walworth.

Mr. Sedgwick cites two other cases; *Woodruff v. Fisher*, 17 Barb. 225, and *Hartwell v. Armstrong*, 19 Barb. 166. Each of these presented a case of sanitary regulation, which was clearly within the constitution. We feel justified in declaring that Mr. Sedgwick, as we understand him, is not sustained by either of the authorities he cites. See *Parham v. Justices*, &c. 9 Geo. 341.

But let us inquire if such construction is not repelled by the very nature of the question. As we have shown above, this clause in our bill of rights was incorporated into the fundamental law, because it was feared that all the departments of the government might fail or be unable to protect the citizens in the rightful enjoyment of their property. It implied no distrust of one department more than another, but a jealous watchfulness of individual rights, and a prudent apprehension, based on the melancholy examples furnished by the experience of mankind, that unbridled power is too apt to merge individual right in national strength and greatness. The oppressions, then fresh in their recollection, which had forced our ancestors to sever all political connection with the mother country, had taught them that the surest and best mode of installing and preserving a noble government was to enfranchise and ennoble the people, whose virtue and happiness should be the first object of all rational government.

The section of the bill of rights we are discussing being intended as a protection to the citizen against abuse of power by the different departments of the government, of what avail can it be under the rule laid down by Mr. Sedgwick? The constitution is, in theory, a law to the legislature. It controls that body as absolutely as it controls the other departments of the government. How can that control be exerted or made available, if the legislature is the sole judge of the extent of its power? Would not this be to render the legislature omnipotent? Would it not be to deny to the constitution all coercive restraint over the legislature, and leave it a mere instrument of moral suasion? Such a construction would forbid that we should regard the constitution as the supreme law of the land, and would substitute that other sentiment, that the constitution, *as expounded by the legislature*, is the supreme law of the land. It would clothe the legislature with the absolute power of construing, as well as enacting statutes, contrary to the letter and spirit of our constitution.—See *Mobile & O. R. R. Co. v. The State*, 29 Ala. 573; *McKoan v. Devries*, 3 Barb. 196; *Harness v. O. & C. C. Co.*, 1 Md. Ch. Decis. 249.

Another argument: If it be true that the legislature are the sole judges of what constitutes public use within the purview of our bill of rights, then it would seem to follow, that whenever the legislature confer the right to take or condemn property for a specified purpose, they need not superadd the declaration that such purpose is a public use. Having the power to take only for public use, it would seem, in all correct reasoning, to follow that the exercise of the power by them would be the assertion that the use was public; otherwise, they would not have the constitutional authority to so act. See authorities to this effect in opinion of the writer of this opinion, in *Ikellheimer v. Chapman*, 32 Ala. 676.

If the view expressed above be correct, then it follows necessarily that no court could pronounce such legislation unconstitutional, unless the law-making power should pursue the unheard-of course of declaring that the act they were performing, though in form legislative, was in reality

unconstitutional and void. That such is not the rule—nay, more, that the legislature cannot, by its own mere declaration, convert a private into a public use—is proved by all the decisions of courts which have held certain acts of this kind to be unconstitutional. We have cited several cases, in which the court ruled the statutes to be unconstitutional. We hereafter cite others.—See *Gardner v. Trustees*, 2 Johns. Ch. 162.

Every officer in the government, from the executive to the humblest magistrate, is charged, to the extent of his sphere, with the preservation of constitutional rights.

If it be contended, as was asserted by Chief-Justice Gibson, (see *Harvey v. Thomas*, 10 Watts, 63,) that inasmuch as the constitution expressly qualifies the taking of private property *only* when the use for which it is taken is public; and that this, by implication, permits private property to be taken for *private* use, the answer is that the argument proves too much. If the word public was inserted in the constitution simply as a qualification of a general and otherwise universal right in the government to take private property, the inevitable sequence from such construction is, that this universal right to take is not even restrained by the constitutional indemnity of compensation to the owner for his private property thus taken. If this argument be sound, private property may, by the exercise of legislative discretion, be taken without limitation; and the owner, whose estate is thereby despoiled, can claim and expect nothing in the form of compensation.

Another, and perhaps more valuable provision of our constitution, declares that the citizen shall not be deprived of his "property, but by due course of law." Without intending, at this time, to define the full meaning of the constitutional phrase, *due course of law*, it evidently does not mean a transfer of property by mere legislative edict, from one person to another. Nor will the usurpation be healed, by bringing a judicial tribunal to sit as a passive witness to the ceremony. The *due course of law*, by which a citizen may be deprived of his property, is something



more substantial than this.—Dorman v. The State, at the present term.

We feel fully justified in laying down the following rules :

1. The legislature cannot, either with or without compensation, take private property for private use.—1 Bl. Com. 139; B. & L. R. Cor. v. S. & L. R. Co., 2 Gray, 137; Taylor v. Porter, 4 Hill, 140; Embury v. Connor, 3 Coms. 511; Ten Eyck v. D. & R. C. Co., 3 Harr. 200; Varick v. Smith, 5 Paige, 137; Parham v. Justices, &c. 9 Geo. 341; Hall v. Boyd, 14 Geo. 1; 13 Ark. 198; Wilkinson v. Leland, 2 Pet. 657.

2. When a use is public, the legislature are the sole judges of the expediency of authorizing the taking of private property for that public use. The court can not take the account, for the purpose of determining whether the *public use* in the particular case furnished an adequate consideration to uphold the authority to take, conferred by the legislature.—See authorities *supra*.

3. Certain uses and purposes are *per se* public, such as public highways, public buildings, and the improvement of the channels of public rivers. Others have been pronounced public, by well considered decisions, as railroads, turnpike-roads, public ferries, public grist-mills, &c. All these, and perhaps many more, the court will judicially know are within the authority left in the legislature by the 13th section of the bill of rights.—See authorities *supra*.

We do not say that the legislature may not declare other uses to be public, or provide the means of testing before some competent tribunal, and upon appropriate proceedings, the question whether there may not be other *uses*, of such general interest to communities, as, upon such finding, to justify a judgment or sentence of the court that the use is public, and justifies the condemnation of private property to a reasonable extent, in the securing of such use. The State is probably interested in the encouragement of industrial pursuits; in reclaiming its waste lands; in leaving its citizens in position to perform public service. Whether these considerations

justify or call for legislative interposition, it is not for us in the first instance, but for the legislature, to determine. Their power, unlike ours, is bounded alone by the constitution. We have no authority to say what the law should be, but only to expound and apply it as we find it.—*Barrow v. Page*, 5 Hay. 97; *Harding v. Goodlet*, 3 Yerg. 41; *Stark v. McGowen*, 1 N. & M. 387; 1 Bald. 220; *O'Hara v. Lexington & R. R. Co.*, 1 Dana, 232; *Pitzer v. Williams*, 2 Rob. Va. 241.

We do not now decide, whether the compensation must be paid before the act of taking or condemning private property is perfected. The subject is treated in the subjoined authorities. They will be seen to be in conflict. Some of the diversity is attributable to the varying phraseology of the constitutional provisions. Some countenance is given, in some of the adjudged cases, to the idea that when the condemnation is for a purpose literally public—cases in which the State, county, or some municipal corporation must pay or make compensation, then it is enough to provide for after-payment.

We repeat, we do not affirm that our constitution demands pre-payment. Still we would think that legislation unguarded, which, at the instance of a private applicant, divested out of the citizen the title to his lands, or to a permanent easement therein, until compensation had been actually paid to him. Such seems to be the rule declared by the Code, in one of the cases under discussion: §§ 2089, 2090, 2091, 2092, 2105.—See *Burden v. Stein*, 27 Ala. 104; *Pierce Am. R. R. Law*, 161—2, *et seq.*; *Beekman v. S. & S. R. R. Co.*, 3 Paige, 45, 73; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wen. 9; *People v. Supervisors*, 4 Barb. 64; *Thatcher v. D. Bridge Co.*, 18 Pick. 501; *Young v. McKenzie*, 3 Hill, 31; *TenEyck v. Del. & Rar. Canal Co.*, 3 How. 200; *Harness v. C. & O. Can. Co.*, 1 Md. Chy. Dec. 248; *Cushman v. Smith*, 34 Maine, 247; *Doughty v. L. & E. R. Co.*, 3 Halst. 51; 1 U. S. Dig. 560, §§ 139, 140; *Gardner v. Trustees*, 2 Johns. Ch. 162; *Donnahu v. State*, 8 Sm. & M. 649; *Smith v. Holmes*, 7 Barb. 416; *McCormie v. Town of L.*, 1 Smith, 83; *Rice v. D. L. & N. T. Co.*, 7 Dana, 81; see, also, 6 Barb. 209; 6 Geo.

130; 3 Kelly, 31; 3 Gratt. 270; 14 Conn. 146; 26 Wen. 485; 3 Watts & Serg. 460; 3 How. Mis. 240; 1 Bald. 205; 4 Wash. C. C. 601; 1 N. H. 339; Wright, 132; 4 Blackf. 505; 1 Penn. State R. 309; Wallace v. Karlenowefski, 19 Barb. 118.

The authority to lay out the road, which is the subject of controversy in the case of *Sadler v. Langham*, rests on sections 1187, 1188 of the Code. Until 1832, there seems to have been no legislative authority for the establishment of private roads in Alabama. In 1832 an act was passed, the first section of which authorized the establishment of private roads. The provisions of that section, and of sections 1187, 1188 of the Code, are substantially alike. Under an irresistible implication, springing out of the language employed in each of these statutes, there was an attempt made to confer authority to take the private property of some person or persons, other than the applicant, as a track for such road. This is a taking of private property. Is the use public? The statute speaks alone of private roads. They are to be opened and kept in repair at the expense of the applicant, and he alone is to make compensation to the owner of the land over which it passes. Their burdens are to be borne by him, and for their performance he can claim no exemption from work on public roads. We think it clearly appears that these uses are simply private; and there is nothing in the statute which authorizes public travel on such private roads. So far as the statutes assume to give authority to lay out such road over the lands of another without his consent, the statute is unconstitutional. In this we are sustained by a divided preponderance of authority.—*Taylor v. Porter*, 4 Hill, 140; *Clark v. White*, 2 Swan, 540; *Brewer v. Bowman*, 9 Geo. 37; *Am. Print Works v. Lawrence*, 3 Zab. 590.

We are aware that, in one case, a private road was established under the act of 1832, and this court declared the proceedings to be regular. The constitutional question, however, was not considered, and we do not feel bound by the result.—*Long v. Com'rs*, 18 Ala. 482.

The authority claimed to erect the dam, which is the



subject of contest in the case of Moore and Wife v. Wright & Rice, is based on the Code, sections 2089, 2091, 2092, 2093, 2104, 2105.

Our first statute on this subject was passed in 1811. Toul. Dig. 623. It related alone to the erection of water grist-mills which grind for toll, and which it declared to be public mills. The next statute was passed in 1812. Toul. Dig. 624; Clay's Dig. 376-7-8. The act of 1812 provided for the erection of dams for water grist-mills, saw-mills, cotton-gins, and other useful water-works, where the applicant owned lands on oneside of the water-course. It gave authority to condemn one acre of land on the opposite bank, for an abutment for such dam. The law of this State, on any question affecting this case, was not changed until the Code became operative.

The Code (§ 1112) declares, that "all grist-mills which grind for toll, are public mills."

The Code authorizes any person who is owner in fee simple of the land on one side, and part of the bed of a water-course which is not a navigable stream, and who proposes to erect a *mill or other machinery*, to have one acre of the land, including the opposite bank of the water-course, condemned to the use of such mill or other machinery, upon making compensation to the owner. It is obvious that this enactment includes the case of a water grist-mill, which grinds for toll, and which, we have seen, is a *public use* which authorizes the taking of private property. It is equally obvious that the Code employs no term which designates or specifies a public water grist-mill, as within its provisions. \* It is embraced in the generic term mill. All other mills and all other machinery, propelled by water-power, no matter how private or exclusive the use, are as plainly embraced within the language of the enactment, as are water grist-mills which grind for toll. The principles we have laid down above, forbid the taking of private property without the consent of the owner, for the erection of mills or other machinery whose use is purely private. We have, then, the case of a statute, which, in the employment of a generic phrase, without expressing the different species included in that

genus, attempts, by words not separable, to confer a general authority, a part of the patent objects of which are within, and others without the pale of constitutional power. In such case, we have no discretion but to pronounce the entire clause unconstitutional.—See *Mobile & Ohio R. R. v. State*, 29 Ala. 573.

This precise question arose under the New York liquor law, in a case which enlisted the best talents, legal and judicial, which adorn that State. One section of their statute prohibited the sale of liquors, save for a qualified use, and made no discrimination between liquors purchased before the statute was enacted, and those acquired afterwards. The court were inclined to hold that, as to purchases made after the statute became operative, no principle of their constitution was infringed. But, inasmuch as the same clause was designed to operate, and did operate, alike upon property then owned and that which should be acquired afterwards, the court, coming to the conclusion that said clause was, as to prior purchases, unconstitutional, pronounced the whole clause unconstitutional and void.—See *Wynehamer v. The People*, 3 Ker. 378; *State of Ohio v. Com'rs of Perry County*, 5 Ohio State, 497; *Campbell v. Miss. Union Bank*, 6 How. Miss. 625, 677; *Bank of Hamilton v. Dudley*, 2 Pet. 492, 526.

For a discussion of kindred questions, examine *Pettit v. Pettit*, 32 Ala. 288; *Harding v. Goodlet*, 3 Yerg. 41.

It may be urged, that these statutes have stood, and been silently acquiesced in for so great a length of time, they should not now be disturbed. We are sensible of the force of this argument. It will be observed, however, that in Tennessee, the decision which declared the private road law unconstitutional was pronounced forty years after the enactment of the statute; and in New York, after seventy years had elapsed. It is, perhaps, never too late to re-establish constitutional rights, the observance of which had been silently neglected.

We are not unmindful of the inconvenience which must ensue from the enunciation of these principles. The remedy is not with us, but with the legislature, save as that body, in common with this, is under constitutional

restraints. We adopt as our own the following language of one of New York's ablest and purest judges:

"It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office on themselves, or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be more than useless.

"Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But, if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."—*Oakley v. Aspinwall*, 3 Comstock, 547, 568.

The case of *Sadler v. Langham* is strictly a private suit. It was set on foot and prosecuted for the private accommo-



dition of M. M. Langham and H. T. Burge. They must pay the costs incurred in the several courts.

|                |   |  |
|----------------|---|--|
| W. G. Sadler   | } | From the Circuit Court of Greene       |
| v.             |   | County.                                |
| M. M. Langham, |   | Ordered by the court, that the judg-   |
| H. T. Burge.   | } | ment of the circuit court be reversed; |

and this court, proceeding to render such judgment as the circuit court should have rendered, doth hereby order and adjudge, that the proceedings had in the court of county commissioners of Greene county be, and the same are hereby quashed.

|                      |   |                             |
|----------------------|---|-----------------------------|
| L. C. Moore and Wife | } | From the Probate Court of   |
| v.                   |   | Lauderdale County.          |
| Wright & Rice.       |   | The judgment of the probate |

court is reversed, and this court, proceeding to render such judgment as the probate court should have rendered, doth hereby order and adjudge, that the proceedings in the probate court be, and the same are hereby quashed.

## McKELLAR vs. COUCH.

[ACTION ON THE CASE FOR WRONGFUL AND MALICIOUS ATTACHMENT.]

1. *When action lies for suing out attachment.*—Under the provisions of the Code, an action on the case does not lie to recover damages for the mere wrongful suing out of an attachment without malice.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. WM. M. BROOKS.

THIS action was brought by Wilson H. Couch, against J. D. W. McKellar, to recover damages for the defendant's act in "wrongfully, maliciously and vexatiously suing out an attachment against plaintiff." The defendant

pleaded the general issue, "with leave to give in evidence any matter which could be specially pleaded;" and the cause was tried on issue joined on that plea. All the evidence adduced on the trial, and the several rulings of the court to which exceptions were reserved by the defendant, are set out in the bill of exceptions, but require no special notice. The only point here decided is presented by the first charge given by the court below, which was as follows: "The court charged the jury, that if the attachment was wrongfully sued out, then, although the defendant acted in good faith and without malice, the plaintiff was entitled to recover." The defendant excepted to this charge, and he here assigns it as error, together with all the other rulings of the court to which he reserved exceptions.

E. W. PETTUS, with whom was JNO. T. MORGAN, for the appellant.—1. At common law, no action would lie for suing out any legal process, without averring and proving malice and a want of probable cause.—3. Bla. Com. 100, and note; Lindsay v. Larned, 17 Mass. 191; McLaren, Ragan & Co. v. Bradford, 26 Ala. 616; McCullough v. Grishobber, 4 Watts & Serg. 201; Stone v. Swift, 4 Pick. 389; Garrard v. Willett, 4 J. J. Mar. 630; White v. Dingley, 4 Mass. 433; Turner v. Walker, 3 Gill & John. 377; Morris v. Corson, 7 Cowen, 281; Ives v. Bartholomew, 9 Conn. 309; Marshall v. Betner, 17 Ala. 832; Tatum v. Morris, 19 Ala. 302.

2. In Wilson v. Outlaw, Minor, 367, it was held, that malice was not necessary to sustain an action on the case for wrongfully suing out an attachment. But that case was decided by a divided court; and that it is contrary to the uniform and unbroken current of decisions, is shown by the authorities above cited. Nor can it be sustained on principle. There is, and can be, no reason why the courts should favor defendants in attachment, more than defendants in any and every other form of action. In detinue, all of a man's slaves may be taken, and, if he is unable to give bond, he may be deprived of their use pending the suit, may lose his credit, and be ruined before

the termination of the suit; yet, unless he can show malice on the part of the plaintiff, he is compelled to be satisfied with the return of the slaves and their hire. In an action for one hundred dollars, if the plaintiff will make oath to certain facts, and give security for the costs, the defendant may be arrested, and unjustly imprisoned; and yet, if there is no malice, his suit for damages would be answered by the phrase, *damnum absque injuria*. In a civil suit, or in a criminal prosecution, the defendant may be charged with an infamous offense, may be blasted in reputation, and ruined in fortune; and yet, when he comes into court for redress, he is told that, unless he can show malice in the plaintiff or prosecutor, he is without remedy. How, then, can the court give Couch a right of action in this case, where, in the language of the charge, McKellar has "acted in good faith, and without malice, believing, and having probable cause to believe, that Couch was about to remove out of the State?" Moreover, if *Wilson v. Outlaw* was correctly decided under the laws then existing, it cannot now be considered as authority; for, while some stress is there laid on the strict construction then given to the attachment law, it is now expressly provided that "the attachment law must be liberally construed to advance the manifest intent of the law."—Code, § 2562.

3. By the act of 1837, which was passed after the decision in *Wilson v. Outlaw* was made, it was provided, "that whenever an original attachment shall have been wrongfully or vexatiously sued out, the defendant therein may, at any time, commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether the suit commenced by attachment be ended or not."—Clay's Digest, 61, § 32. This statute clearly gave an action on the case, whenever an attachment was "wrongfully or vexatiously sued out;" and under this statute were decided the cases of *Kirskey v. Jones* 7 Ala. 622, and *Seay v. Greenwood*, 21 Ala. 491.

4. But the act of 1837 has been repealed by section 2564 of the Code, which is in these words: "The defendant must not deny or put in issue the cause for which the



attachment issued, but may, at any time within three years of the suing out of the attachment, before or after the suit is determined, commence suit on the attachment bond, and may recover such damages as he has actually sustained, if the attachment was wrongfully sued out." The first clause of this section is almost identical with the first clause of that section of the act of 1837, above quoted; and each statute provides, that the defendant may bring his action before the termination of the attachment suit. But note the differences between the two statutes: By the act of 1837, suit may be commenced "at any time;" under the Code, it may be commenced "at any time within three years." The act of 1837 gave a suit "against the plaintiff;" the Code gives a suit, not against the plaintiff, but "on the attachment bond," which, in many cases, is not executed by the plaintiff. The act of 1837 authorized the defendant to recover "any damages which he may have sustained, or to which he may be entitled on account thereof;" the Code authorizes him to recover "such damages as he has actually sustained." True, section 2565 gives vindictive damages for malice; but that section was only designed to apply the common-law measure of damages to an action on the bond, where the plaintiff in attachment had acted maliciously as well as wrongfully. If any effect is to be given to these changes in the law, they must be held to limit the remedy of the defendant in attachment, in the absence of malice, to an action on the bond.

5. To say that the common-law rule, requiring a party injured by a suit to show malice before he can recover damages, does not apply to suits by attachment, because such suits are the mere creature of the statute, is to assume the very point in controversy. The rule of the common law applies, not only to common-law suits, but to all suits not excepted by statute from its influence. The same objection was made in *Lindsay v. Larned*, 17 Mass. 189, which was an action on the case for causing an attachment to be levied on the plaintiff's property. See, also, *Stone v. Swift*, 4 Pick. 389; *McCullough v. Grishobber*, 4 Watts & Serg. 201; *Williams v. Hunter*, 3 Hawks, 545; *Marshall v. Betner*, 17 Ala. 802.

6. If the statute does not give an action on the case for the wrongful suing out of an attachment, the inconvenience and injury to which defendants in attachment will sometimes be subjected, either where there is no bond, or where the penalty of the bond is not sufficient to cover the damages sustained, may afford an argument to the legislature in favor of a change in the law, but cannot enter into the consideration of the courts in construing the existing law. The courts have no power to provide for a *casus omissus* in the statute law.

W. M. BYRD, and GEO. W. GAYLE, *contra*.—1. It was settled by several decisions of this court, under the law which existed prior to the adoption of the Code, that an action on the case could be maintained for the mere wrongful suing out of an attachment.—*Wilson v. Outlaw*, Minor, 367; *Kirksey v. Jones*, 7 Ala. 625; *McCullough v. Walton*, 11 Ala. 495; *Donnell v. Jones*, 13 Ala. 492; *Forrest v. Collier*, 20 Ala. 175; *Seay v. Greenwood*, 21 Ala. 493.

2. The attachment law found in the Code is substantially the same as the law which previously existed, and must, therefore, receive the same judicial construction which had been placed on the former law.—*Duramus v. Harrison & Whitman*, 26 Ala. 326; *Ex parte Banks*, 28 Ala. 38; *Sartor v. Br. Bank*, 29 Ala. 353; *Stallworth v. Stallworth*, 29 Ala. 76. The only material difference between the old law and the new, is that the latter prescribes three years as a statute of limitation, while the former prescribed no limitation.

3. There is nothing in the language of the Code, or deducible from the spirit of any of its provisions, to justify the inference that the codifiers or law-makers intended to confine the party injured by the suing out of an attachment to an action on the bond: on the contrary, there are several reasons why such could not have been their intention. That the word *may*, as used in section 2564, is not used in its imperative sense, as the synonym of *must*, see *Ex parte Simonton*, 9 Porter, 390. If section 2564 be held applicable only to an action on the bond, section 2565 must be limited in like manner. If an action on the

bond be the only remedy allowed the defendant in attachment, he is, of course, without remedy where no bond is given; and in many cases where bond is given, the amount of the penalty being only double the amount of the plaintiff's debt, his remedy is wholly inadequate to the injury actually sustained.

R. W. WALKER, J.—The principal question in this case is, whether an action on the case will lie to recover the damages sustained by the mere wrongful suing out of an attachment.

By the ancient common law, no person could prosecute a civil action, without having in the first stage of it two or more persons as pledges of prosecution; and if he failed in his suit, an amercement, or fine to the king, was imposed on him. But this guard against unjust suits at length lost all its vigor, and evaporated into mere form; and in its stead, by various statutes, costs to the defendant were substituted. These costs were intended, and are considered, as a satisfaction to the defendant for the inconvenience of being held to defend a groundless suit; and except where statutes have otherwise provided, they are, in cases where no malice is shown, the only indemnity which the law secures to the defendant. The general principle is thus broadly stated by Lord Coke: "And therefore, where it is said that a man shall not be punished for suing of writs in the king's courts, be it of right or wrong, it is regularly true."—Coke Litt. 161, (a). This language must be held to refer to suits which are simply unfounded, not malicious. For the authorities all agree in holding, that if the suit be malicious, as well as unfounded, an action on the case will lie to recover the damages occasioned by it; while, on the other hand, the undoubted principle of the common law is, that the mere wrongful resort to legal process affords no ground of action.—Co. Litt. 161, (b), note; *Lindsay v. Larned*, 17 Mass. 190; *McLaren, Ragan & Co. v. Bradford*, 26 Ala. 618; *Marshall v. Betner*, 17 Ala. 87; *McCullough v. Grishobber*, 4 Watts & Serg. 121.

It follows that, where an attachment has been sued out



wrongfully, but without malice, the party injured cannot maintain an action on the case to recover the damages, unless there is some statutory provision giving him that right. To determine whether we have any statute which, properly construed, confers such a right, it becomes necessary to examine to some extent the history of our legislation upon the subject, and the course of decisions in reference to it.

The remedy by attachment seems to have been given as early as 1799, and was fully established and regulated by an act of the territorial legislature passed in 1807. By that act, the plaintiff in the attachment was required to give a bond, the condition of which was as follows: "Now, if the said plaintiff shall prosecute his suit with effect, or, in case he fail therein, shall well and truly pay and satisfy to the said defendant all such costs and damages as shall be awarded and recovered against the said plaintiff, his heirs, &c., in any suit or suits which may be hereafter brought, for wrongfully suing out the attachment, then the above obligation to be void."—Laws of Ala. 11, 13, 15.

In *Wilson v. Outlaw*, Minor's R. 367, the precise question now before us was presented; and the court there held, that an action on the case would lie against the plaintiff in the attachment, if the attachment was sued out wrongfully, though without malice. In the opinion of the court in that case, the condition of the bond, above quoted, as required by the act of 1807, was especially referred to as a reason (though not the only one) for the decision. If the court intended to decide that, independent of some statute authorizing the action, case would lie for the mere wrongful resort to the process of attachment, we should have no hesitation in saying that the decision could not be regarded as correct. But, if the decision is to be considered as resting upon the terms of the attachment bond then required, we are not prepared to say that it was wrong, though we would not be understood as affirming it to be right.

The proposition, that the legislature had, by the form of the bond prescribed by the act of 1807, sufficiently

indicated that the defendant was authorized to bring an action on the case against the plaintiff for wrongfully suing out the attachment, seems to be supported by the decision of the supreme court of North Carolina, in *Davis v. Gully*, 2 Dev. & Batt. 360. In that case it was determined, that a bond, with condition to be void upon the payment of such damages as might be recovered of the principal obligor, for wrongfully bringing a suit in equity against the obligee, is a guaranty that the principal shall be able to satisfy any judgment obtained against him in an action on the case for wrongfully filing the bill.

It seems to be intimated in some of the cases, that no action would lie upon such a bond as that prescribed by the act of 1807, until the damages had been ascertained in a distinct suit against the plaintiff.—See *Herndon v. Forney*, 4 Ala. 246; *Alford v. Johnson*, 9 Porter, 320; *Garrett v. Logan*, 19 Ala. 347.

The language of the condition seems to indicate, that damages for wrongfully suing out the attachment might be recovered of the principal, in a suit against him, not founded upon the bond; and inasmuch as the liability of the sureties is made to depend upon the preliminary suit against the principal, the implication is, perhaps, not reasonable, that the statute, by prescribing such a condition, must be considered as having conferred on the injured party the right to bring an action on the case against the plaintiff.

If the decision of *Wilson v. Outlaw* can be supported at all, it is upon this ground alone. The only basis on which it can rest being the terms of the bond as prescribed by the act of 1807, it follows that, when that act was in respect of the condition of the bond repealed, the decision at once ceased to be authority.

In 1833, the attachment law was revised. This act, in its sixth section, prescribed precisely the same form of bond as that required by the act of 1807.—*Aikin's Dig.* 38, § 6. In 1837, another statute was passed, by which it was enacted, that the condition of the bond should be to prosecute the attachment to effect, and pay the defendant all such damages as he may sustain by the wrongful

or vexatious suing out of the attachment.—Acts of 1837, p. 62. In *Lowe v. Derrick*, 9 Porter, 415, it was held, that this act was a repeal of so much of the 6th section of the act of 1833, as prescribed a different condition for the bond, and a re-enactment of the 3d section of that act. The 6th section of the act of 1833 was, as already stated, but a re-enactment of that part of the act of 1807, which constituted the only basis on which the decision in *Wilson v. Outlaw* could be supported. The basis of that decision being thus destroyed, we cannot regard it as an authority entitled to any weight in this case. The material distinction between the bond required by the act of 1807, and that prescribed by the act of 1837, is clearly pointed out in *Herndon v. Forney*, 4 Ala. 246; see, also, *Alford v. Johnson*, 9 Porter, 320; *Garrett v. Logan*, 19 Ala. 347; *Boyd & Walker v. Martin*, 10 Ala. 700, (702.)

After the act of 1837 was passed, the right of the defendant to bring an action on the case against the plaintiff, for wrongfully suing out an attachment, still continued to exist, but it was derived from a new and altogether different source. After the passage of that act, the right to bring such an action depended, not upon the condition of the bond required to be given, but upon the *proviso* to the 5th section of that act, which was in these words: “*Provided*, however, that whenever any original attachment shall have been wrongfully or vexatiously sued out, the defendant therein may, at any time, commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether the suit commenced by attachment be ended or not.”—Clay’s Dig. 61, § 32.

In *Donnell v. Jones*, 13 Ala. 501, which was an action on the case for wrongfully and maliciously suing out an attachment, the court said: “On the part of the plaintiff in error it is insisted, that the action is misconceived; that the plaintiff below should have brought his action upon the bond given by Donnell, in order to procure the issuance of the attachment, as required by statute.—Clay’s Dig. 61, § 34. We do not agree with the counsel in this



position. The act of 1837 provides, that 'when any original attachment shall have been wrongfully or vexatiously sued out, the defendant may, at any time, commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether the suit commenced by attachment be ended or not.'

In *Seay v. Greenwood*, 21 Ala. 494, which was an action on the case for wrongfully suing out an attachment, the court, after setting out the 5th section of the act of 1837, proceeds: "The legislature evidently intended, by the enactment of this statute, to make the wrongful suing out of the process referred to, of itself, a sufficient cause of action, and, in such case, to authorize the defendant to recover for the actual damages sustained; and if the attachment is sued out maliciously as well as wrongfully, to recover vindictive damages, without, in either case, waiting for the determination of the suit against him. Such was the construction given to this section of the statute referred to, in *Kirksey v. Jones*, 7 Ala. 622; and we are satisfied that the decision was correct." To this it may be added, that an action on the case is a proper one for enforcing a right to damages given generally by statute, especially where no other adequate remedy is specifically prescribed by statute.—*Autauga County v. Davis*, 32 Ala. 703.

There can be no doubt, that after the repeal of the act of 1807, and the enactment of the statute of 1837, the real and only basis for the decision, that an action on the case would lie for the mere wrongful suing out of an attachment, was the 5th section of the last-named act. Indeed, it would be impossible to sustain the cases which assert that such an action would lie, as correct rulings of the law, except by reference to that act. Take away that provision in the statute of 1837, and where in the legislation of the State can be found any act, which, upon the most liberal construction, could be held to change, as against plaintiffs in attachment, the well established principle of the common law, that an action on the case will not lie to

recover damages for the mere wrongful resort to legal process?

It will be observed, that the act of 1837 did not deprive the defendant in attachment of any rights of action allowed him by the common law. These were, the right to sue on the bond to recover damages for either wrongfully or vexatiously suing out the attachment, and the right to sue in case for the malicious resort to the process. Neither of these rights of action could be enforced at the common law, until the termination of the attachment suit.—*Tatum v. Morris*, 19 Ala. 302; *Hill v. Rushing*, 4 Ala. 213; *Herndon v. Forney*, *ib.* 243; *Spivey v. McGee*, 21 Ala. 417; *Garrett v. Logan*, 19 Ala. 346. These common law rights of the defendant were by the statute left intact, but new rights were superadded, namely, the right to bring either of the actions authorized by the common-law before the termination of the attachment suit, and the right to bring an action on the case against the plaintiff for the mere wrongful suing out of the attachment.—*Donnell v. Jones*, 13 Ala. 501-2.

Thus stood the law until the Code was adopted. Having shown that, before the Code, the only authority for an action on the case, for the mere wrongful resort to the process of attachment, was given by the 5th section of the act of 1837, let us now consider whether any provision, similar in effect to that section, is to be found in the Code.

A safe general rule for construing the Code is stated in *Ex parte Banks*, 28 Ala. 38. "In the framing of the statutes found in the Code, the legislature must be presumed to have had in view the existing law, and the construction placed upon it by this court. By carrying into the Code a law *substantially* the same with that which previously existed, the legislature must be intended to have had reference to the construction placed on the old law, and the legislative sanction of it may, therefore, be inferred."—See, also, *Duramus v. Harrison*, 26 Ala. 326. It would seem to be a corollary from this proposition, that if the legislature, in codifying the law upon a subject embraced by an old statute, while substantially re-enacting

some of the provisions of the former statute, employs in reference to the special matter embraced by another one of its provisions words materially variant and expressive of a different purpose, the fair conclusion is, that it was not the intention to re-enact, but on the contrary to change in this respect, the former law.

The only sections of the Code which relate to the particular matter covered by the 5th section of the act of 1837, are in the following words:

“§ 2564. The defendant must not deny or put in issue the cause for which the attachment issued, but may, at any time within three years of the suing out of the attachment, before or after the suit is determined, commence suit on the attachment bond, and may recover such damages as he has actually sustained, if the attachment was wrongfully sued out.

“§ 2565. If sued out maliciously, as well as wrongfully, the jury may, in addition, give vindictive damages.”

The marked difference between the language of the two sections above quoted, and that employed in the 5th section of the act of 1837, will at once strike the attention. The latter statute gives a general right to ‘recover any damages which the defendant may have sustained, or to which he may be entitled’ on account of the wrongful or vexatious suing out of the attachment, without designating any particular form of action as the remedy to be pursued. On the other hand, nothing can be more obvious than that both of the foregoing sections of the Code relate to one and the same suit, and that is expressly declared to be a suit on the bond. In reference to that suit, they give to the defendant the right to commence it before the termination of the attachment suit, prescribe a statute of limitations which is to govern it, and fix the measure of damages to be recovered. This is the clear meaning of the words; and when words are plain, there is no room for construction. It would be nothing short of judicial legislation, for us to deduce from this language the authority to bring an action on the case for the mere wrongful suing out of an attachment. By a rule of the common law, that right was denied to the defendant; and



a statute is never construed as abolishing a rule of the common law, unless by express words or necessary implication. It is said that courts are bound to uphold the rule of the common law, if that and the statute to be construed may subsist together.—Berley v. Rampacher, 5 Duer, 183; Sedg. on Stat. & Const. Law, 127-9, and authorities cited; Williams v. Potter, 2 Barb. 316; Comm. v. Herrick, 6 Cushing, 465.

The common-law right of the defendant to bring an action on the case for maliciously proceeding by attachment is not touched by these sections of the Code, unless it *may be* that the provision, which prohibits the defendant from putting in issue the cause for which the attachment issued, destroys the reason of the common-law rule which postponed the right of action until the termination of the suit, and that the rule ceases with the reason of it. On this question we intimate no opinion. In like manner, the right of the defendant to an action on the bond, for the wrongful or vexatious suing out of the attachment, belongs to him at common law. The regulation of *this* right is the purpose of these sections. They give to the defendant the privilege denied him by the common law, of bringing his action before the attachment suit is terminated; and they limit the period within which it must be brought.

The form of the bond required by the Code is altogether different from that prescribed by the act of 1807, and furnishes no such implied authority for an action on the case against the plaintiff, as, we have seen, might be drawn from the peculiar condition of the bond required by this latter act.

It may be objected to this construction of the Code, that inasmuch as, in an action on the bond, the recovery is necessarily limited by the penalty, the result will be, that in many instances the remedy of the party injured by an attachment wrongfully issued, may be inadequate. This is true, and it would be an argument entitled to weight, if the words of the statute were obscure, or of doubtful import: but, where the language is unambigu-

ous, it is a consideration which is properly addressed, not to those who construe, but to those who make the law.

It is also said, that if section 2564 has reference alone to actions on the bond, then the last clause of that section, and the whole of section 2565, are simply declaratory of what the law would have been if there had been no statute on the subject. It may well be doubted whether this is true in reference to the provision made in section 2565. But, conceding it to be so, statutes which do not change, but only affirm the principles of the common law, are by means rare; and it would not be difficult to find in the Code many illustrations of this fact. Such would be the character of section 2565, if we adopt the construction, urged by the counsel for the appellee; for, if that section applies to actions on the case, it simply asserts what would have been the rule independent of any statute.

Our conclusion is, that in the present state of our laws, an action on the case, or a suit in the nature of an action on the case, does not lie for the suing out of an attachment wrongfully, but without malice.

The judgment is reversed, and the cause remanded.

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### McREE'S ADM'RS vs. MEANS.

[BILL IN EQUITY TO ESTABLISH PRECATORY TRUST, FOR ACCOUNT, &C.]

1. *Precatory words in will construed.*—The words, “But, should my said husband” (who was made sole residuary legatee) “die without issue of his body, it is my wish and will he shall give all of said property to R.,” create a precatory trust in favor of R.
2. *Repugnancy.*—It is a settled principle of law, that an absolute power of disposition or alienation in the first taker defeats a limitation over by way of executory devise; but this principle does not invalidate a remainder, by way of executory devise, limited upon the death without issue of his body of the first taker, to whom the property was bequeathed, “to have and to hold to him, his heirs and assigns forever, to his use, behoof and benefit, in fee simple.”

3. *Enlargement of life estate into fee by implication.*—The established doctrine, that a charge for the payment of debts or legacies, on the person of a devisee whose estate is undefined, enlarges his estate into a fee by implication, does not apply to a residuary bequest of the “balance” of the testator’s property after payment of a legacy in money to another; the payment of the legacy in money being a charge on the estate, and not on the person of the residuary legatee.
4. *Remoteness.*—The word *remainder*, as used in section 1302 of the Code, includes executory devises; consequently, an executory devise, limited to take effect on the death of the first taker “without issue of his body,” whatever might have been its effect at common law, is not void for remoteness under the Code.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

THE material facts shown by the record are these: Caleb P. McRee and Martha Ann Burt were married, in this State, on the 17th January, 1847. At the time of said marriage, Mrs. McRee owned a considerable separate estate, which consisted of lands, slaves, stock, and other things appertaining to a cotton plantation, money, choses in action, &c. Mrs. McRee died about the 1st March, 1855, having made and published her last will and testament, dated the 15th August, 1854, which was duly admitted to probate in Lowndes county after her death, and which contained the following provisions: “1. It is my will, wish, and desire, that all just debts due by me, or on account of my estate or property at my death, be promptly paid by my executor, hereinafter named. 2. I give, bequeath and devise unto Robert P. Means the sum of \$5,000, to be paid him, the said Robert, in five annual payments, computing from my death as to time. 3. I give, bequeath and devise all the balance of my property and estate, both real, personal and mixed, also all choses in action and chattels, to my beloved husband, Caleb P. McRee, to have and to hold said property and estate, real, mixed, personal, choses in action, and chattels, to him, the said Caleb P., his heirs and assigns forever, to his use, behoof and benefit, in fee simple; but, should my said husband die without issue of his body, it is my wish and will he shall give all of said property to Robert P. Means. 4. I hereby constitute and appoint my said hus-



band, Caleb P. McRee, executor of my last will and testament," &c. C. P. McRee duly qualified as the executor of his deceased wife, took possession of all the property, paid off the debts, together with two installments of the pecuniary legacy to Means, and died in October, 1857, intestate, and without issue of his body. Letters of administration on his estate were soon afterwards granted to James C. McRee and Andrew B. Hurst, who took possession of the entire property, and claimed it as belonging to the estate of their intestate. Robert P. Means thereupon filed his bill against them, claiming the property under the third clause of Mrs. McRee's will, above copied, asking an account, &c. The chancellor, on final hearing, rendered a decree in favor of the complainant, which the defendants now assign as error.

WATTS, JUDGE & JACKSON, for appellants.—If Means takes at all under the third clause of the will, he must take as executory devisee: he cannot take as a contingent remainder-man. We contend, that no trust is created in his favor, for the following reasons:

1. To create a trust of the character here contended for, the words used must be imperative on the first taker: they must leave him no discretion or choice; and if it is not apparent from the whole will that the words, whatever they may be, were intended to be imperative, no trust is thereby created.—2 Story's Equity, § 1070, and authorities cited in note 2; 2 Spence's Equity, 67–69, and notes. The language of the clause here relied on, especially when taken in connection with other parts of the will, is not necessarily imperative. According to the modern English rule, and certainly according to the rule in Alabama and other States, the words must be construed in their plain, common-sense meaning, and will not be construed into a trust, unless the context irresistibly forces to such a construction.—2 Story's Equity, §§ 1069–70; *Sale v. Moore*, 1 Sim. 534; *Meredith v. Hineage*, 1 Sim. 543; *Webb v. Woolls*, 13 Eng. Law & Eq. 63; *Pennock's case*, 20 Penn. St. R. 268; *Gilbert v. Chapin*, 19 Conn. 342; *Green v. Marsden*, 21 Eng. Law & Eq. 538; *Jackson*

v. Robbins, 16 Johns. 537 ; Jackson v. Bull, 10 Johns. 20 ; Ellis v. Ellis, 15 Ala. 296. This last case follows Story, Kent, and other American authorities. In Sale v. Moore, *supra*, the vice-chancellor said, "The first case that construed words of recommendation into a command, made a will for the testator. The current of decisions, of late years, has been against converting the legatee into a trustee."

The will shows that the testatrix knew the difference between words of wish, desire, request, or recommendation, and words of imperative and commanding nature. In the 2d clause of the will, speaking of the legacy of \$5,000 to Means, she says, "I give, bequeath and devise," &c. ; and in the 3d clause she uses similar language. The chancellor says, that the words *will, wish and desire*, as used in the first clause in reference to the payment of debts, are certainly imperative ; and that, therefore, the same words must be understood in the same sense as used in the 3d clause. But this by no means follows, even if the words in the 1st clause are imperative. In the 3d clause, they really amount to nothing, unless they qualify the word *property*, therein used ; for the law made it the imperative duty of McRee, as executor, to pay the debts, &c., and no words of the testatrix could add to the imperative nature of this duty. The words *will, wish and desire*, in the first clause, are not imperative ; they simply express the strong desire of the testatrix that the debts should be promptly paid, and, therefore, were not used as a command. Neither *will*, nor *wish*, is, of itself, necessarily imperative. The latter is certainly the reverse of imperative ; and the former, according to Webster, does not necessarily mean command. The definitions given by him are—1st, a faculty of the mind ; 2d, choice, determination ; 3d, choice, discretion, pleasure ; 4th, command, direction ; 5th, disposition, inclination, desire. The words themselves of the clause, apart from the context, are not imperative. Does the context make them more or less imperative ? If she used those words as a command, why should she say, "*he shall give* ?" If she intended, absolutely and unqualifiedly, that Means should have the

property on the death of her husband without issue of his body, why should she leave anything to be done by her husband? Why not say so in terms plain and unmistakable? The use of the word *give*, in the connection here found, implies the most absolute power over the subject of the gift. He could not *give*, unless the property belonged to him. Did the testatrix intend by this language that, in making the gift, McRee should act as her executor, or as husband and first taker? If as executor, the devise over would certainly be too remote.—*Miller v. McComb*, 26 Wendell, 229. If she intended that, in making the gift, he should act as first taker, this necessarily implied the power of disposition, which would defeat the executory devise. If Means takes at all, he must take as purchaser from the testatrix; if he takes by the gift of C. P. McRee, he does not take as purchaser under the will.

The language used in creating the estate in McRee, shows that the testatrix did not intend the words, *wish*, *will*, &c., to be imperative on him. She gives him her *estate* in the property, which implies everything over which she had dominion. She does not convey to him for life, or for any term of years; but to him, "his heirs, and assigns forever;" not to the use or trust of any other person, but "to his use, behoof and benefit, in fee simple." She conveys to him property which was of a perishable nature, and which must have been consumed in its use. She makes no distinction between that which is permanent and imperishable, and that which is not. Did she intend that *he* should give that which *had* been consumed in its use, or that which he had already sold, given away, transferred, or otherwise disposed of? All this he had a right to do, unless we strike from the context the words, *estate*, *assigns*, *use*, *behoof and benefit*, in *fee simple*. If the absolute property is given to the first taker, the strongest expressions of will, wish, recommendation or request, cannot be held imperative; and so if any words are used, by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, or may destroy or dispose of it.



Is it more probable that the testatrix intended to give the absolute property to her husband, with a request that he would give, &c., or that the words *wish and will* should imperatively qualify and control the strong words giving the estate to her husband? Which set of words is the stronger, "*will and wish*," or "*estate*," "*to him, his heirs and assigns forever, to his use, benefit and behoof, in fee simple*? We think it clear that the latter, giving the whole estate to her husband, are stronger than the former words. The former words, taken in their plain, common-sense meaning, are simply the expression of a strong desire that her husband, in case he should die without issue, should give the property to Means. They were intended as mere moral suggestions, to excite and aid the discretion which her husband had over the property, and not to control and govern that discretion. She intended to leave it to the good will and pleasure of her husband to dispose of this property as he might choose; but, in the event of his having no issue, she strongly wished him to consider that her kinsman, Means, was an object of her good will, and, in remembrance of this, to center his good will and bounty on Means.

If there is any trust in this case, it is an implied trust. In *Webb v. Woolls*, *supra*, there was an express trust; but, because of several strong words used in giving the estate to the first taker, the trust was held repugnant to such estate, and therefore void. If an express trust was held void for such reasons, *a fortiori* an implied trust cannot be upheld.—Authorities cited *supra*; also, *Knight v. Knight*, 3 Beavan, 175; *Greenleaf's Cruise*, vol. 3, note 2, p. 367, and authorities cited; 2 *Spence's Equity*, 69–70, and notes; *Huskisson v. Bridge*, 2 Eng. Law & Eq. 180; 1 *Vesey*, sr. 9; *Williams v. Williams*, 5 Eng. Law & Eq. 47; 2 *Hill's Ch.* 490; 14 *Sim.* 378; *Green v. Marsden*, 21 Eng. Law & Eq. 538.

2. The absolute estate being given to C. P. McRee, the subsequent limitation over is void for repugnancy.—Authorities above cited; also, *Flinn v. Davis*, 18 Ala. 132; *Allen v. White*, 16 Ala. 181; *Denson v. Mitchell*, 26 Ala. 360. In the case last cited it is said, that the only excep-

tion to the rule, that a power of disposition in the first taker is destructive of an executory devise, "is where an express life estate or term of years is given." *Smith v. Bell*, 6 Peters, which is cited by the appellee's counsel, is based expressly on the ground, that an estate for life only was given to the first taker. On the same point see, also, *Patterson v. Weathers*, 30 Ala. 404; 2 Story's Equity, §§ 1069-70, 1073; *Bull v. Jackson*, 10 Johns. 20; *Jackson v. Robbins*, 16 Johns. 537; *Pennock's case*, 20 Penn. State R. 268; *Webb v. Woolls*, 13 Eng. Law & Eq. 63; *Knight v. Knight*, 3 Beavan, 176; 1 Vesey, 270, and note 3; *Sale v. Moore*, 1 Sim. 542; *Meredith v. Hineage*, 1 Sim. 552; 3 Vesey, 7; *McLean v. McDonald*, 2 Barbour's (S. C.) R. 535; *Ferris v. Gibson*, 4 Edw. Ch. 707; *Gilbert v. Chapin*, 19 Conn. 342; *Davis v. Bridgman*, 2 Yerger, 558; *Williams v. Jones*, 2 Swan, 620; *Sevier v. Brown*, 2 Swan, 112; *Elton v. Eason*, 19 Vesey, 78; *Lewis on Perpetuities*, 322, 362. Even where a life estate only is given in express terms to the first taker, coupled with a general power of disposition, he takes the absolute property, and a limitation over is void.—19 Vesey, 86, and authorities cited in note; *Davis v. Richardson*, 10 Yerger, 290. It may be conceded, that an executory devise may be limited on a mere fee; but it cannot be limited on a fee simple absolute. A fee, in modern English tenures, signifies an estate of inheritance; but a fee simple imports an absolute inheritance, clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs generally.—*Patterson v. Ellis*, 11 Wendell, 278; 1 Bla. Com. (m. p.) 106; *Lewis on Perpetuities*, 322, 362; *Elton v. Eason*, 19 Vesey, 78. Personal property may be limited over after a life estate, but not after a gift of the absolute property. If the absolute property, or the right of disposition, is given to the first taker, the limitation over is void; because the first taker has, in either event, the right of destroying the limitation over, and this right is inconsistent with the existence of an executory devise. And it makes no difference whether the power of disposition is express or implied, nor whether it has been exercised or not.—Au-

thorities *supra*; 2 Kent's Com. 352; Cuthbert v. Purrier, 4 Cond. Eng. Ch. 191; Brown v. Gibbs, 1 Russ. & My. 614; Keyes on Chattels, §§ 73, 146; Cook v. Walker, 15 Geo. 457; Bardswell v. Bardswell, 9 Sim. 319; Pope v. Pope, 10 Sim. 1; Curtis v. Rippon, 5 Madd. 434; Jackson v. Bull, 10 Johns. 20; Newland v. Newland, 1 Jones Law Rep. 463; 2 Story's Equity, § 1070; 2 Spence's Equity, 68, 69, and notes; Bland v. Bland, 2 Cox, 351; Fitzg. 8; 2 Vesey, 531.

What ownership, then, what power, did C. P. McRee have over the property? If the dictionaries of the English language were searched for the strongest terms to express absolute and uncontrollable ownership, stronger terms than are here used could not be found. The word *estate* imports the most absolute ownership.—Jackson v. Robbins, 16 Johns. 537; Knight v. Knight, 3 Beavan, 176. The testatrix not only gives him her *estate* in the property but “*to his heirs and assigns forever*,” and not merely to him and his assigns during life, or for a term of years, but “*to his use, benefit and behoof, in fee simple*.” We are bound to give effect to each word in the will, and to suppose that the testatrix meant something by each word, and to enforce the intention thus ascertained, if that intention be legal. Independent of other strong words, importing the most unlimited, unfettered, and uncontrollable ownership, the word *assigns* implies, *ex vi termini*, the right to sell, give away, or dispose in any other manner of the estate given to him. It is defined by Bouvier to mean “those to whom rights have been transferred by particular title, such as sale, gift, legacy, transfer, or cession.” See, also, Webb v. Woolls, *supra*, in which the effect of the word is argued. By the use of this word, the testatrix necessarily empowered her husband to sell or give, either by deed or by parol, to will or to transfer the property, whensoever, howsoever, and to whomsoever he might think proper. And all this strong language, be it remembered, is employed in reference to property which must be consumed in the use, as well as to that of a permanent and imperishable nature. McRee certainly took an absolute estate in the property which was of a perish-



able nature; and inasmuch as the same language is used in reference to each kind of property, it must be presumed that the testatrix intended McRee to take the same interest and estate in each kind.—2 Spence's Equity, 149; 2 Jarman, 362; 2 Russ. & My. 567. If McRee had sold or otherwise disposed of any part of the property, or the whole of it, Means could not have recovered it. His power of disposal was general, and would have enlarged a life estate into an absolute one.—Authorities on this point *supra*; 10 Yerger, 290; 6 Gill & John. 171. He certainly had the right to use and destroy that portion of the property which was of a perishable nature; and in such case the executory devise fails.—2 Vesey, jr., 531; Bland v. Bland, 2 Cox, 351; 1 Jones' Law R. 463; Fitz. 8.

3. The general intent, if legal, must be enforced at the sacrifice of the particular intent.—2 Spence's Equity, 67. In this case, the great and general intent of the testatrix was to benefit her husband; he was the prime object of her affections, and of her bounty. Now, if Means takes this property, that intent will be defeated. By taking under the will, and paying off the debts and a part of the legacy, McRee made himself personally responsible to Means for the balance, and his estate is liable for the entire unpaid portion.—Olmsted v. Harvey, 1 Barb. 113; Trent v. Trent, 1 Gilm. 174; 2 McCord, 395; 1 Edw. 201; 13 Gratt. 171. Five years would be required to pay the pecuniary legacy to Means. Out of what fund—the *corpus*, or the income of the property—were this legacy and the debts to be paid? The debts have been paid, and the legacy is a charge on McRee's estate. If Means can now recover the property, the effect will be to bankrupt McRee's estate. How, then, has McRee or his estate been benefited by the bounty of the testatrix?

4. But, admitting that the testatrix intended to create a trust in favor of Means, that the words are imperative, and that there is no such repugnancy as will defeat the trust, it is nevertheless insisted that the limitation over is void for remoteness. It is now too well settled to admit of argument, that the words, "*issue of his body*," imply an indefinite failure of issue, unless their meaning is

restricted by something else in the will.—Landman v. Snodgrass, 26 Ala. 593; Ewing v. Standifer, 18 Ala. 400; Powell v. Glenn, 21 Ala. 458; Darden v. Burns, 6 Ala. 362; Hamner v. Smith, 22 Ala. 433; Isbell v. Maclin, 24 Ala. 315; 1 Barbour, 565; 2 Rich. Eq. 142; 4 Grattan, 16; 4 Barbour, 419; 8 Iredell, 25; 4 Edw. Ch. 707; 8 Iredell, 133; 3 Rich. Eq. 271; 3 Md. Ch. 272; 8 Rich. 307; 12 Grattan, 425; 26 Wendell, 229; 11 Wendell, 259; 20 Eng. Law & Eq. 234. There is nothing in this will to restrict or explain the meaning of the words, and the case falls within none of the recognized exceptions to the general rule.—26 Wendell, 229; 2 Jarman, 319–22; 2 Roper on Legacies, 1555; 8 Sim. 22; 11 Eng. Ch. 303. Nor does any provision of the Code change this construction. Technical words, when used in the Code, must be understood to have been used in their technical sense, unless the contrary is clearly shown.—*Ex parte Vincent*, 26 Ala. 145. The word *remainder*, as used in section 1302, does not include executory devises. Section 1301, and other portions of the Code, show that the law-makers knew and recognized the distinction between remainders and executory devises, and would not have used one term alone when they meant to include both.

5. The cases cited by the appellee's counsel, when examined, will not answer the argument and authorities on which we rely. *Wall v. Mallard*, 11 Eng. Law & Eq. 4, was an express trust, and there were no words in the first gift absolutely inconsistent with the trust for the children. *Harrison v. Harrison*, 2 Grattan, 14, was not an executory devise, but a vested remainder, and so held by the court. *Hill v. Hill*, 4 Barbour, 427, was based on a provision in the will requiring the payment of sums of money to the devisees when they became of age, which was held to restrict the meaning of the otherwise indefinite words. *Cole's case*, 18 Barbour, 384, was precisely in principle like the case of *Hill v. Hill*. In *Chrystie v. Phyfe*, 22 Barbour, 195, the devise over was to vest in the event that the daughter died unmarried, and left no child her surviving.

D. W. BAINE, and JNO. A. ELMORE, *contra*.—1. The first question in the case is, whether the testatrix intended to create a trust in favor of Means, on the death of her husband without issue; and in the determination of this question we should, in the first place, look to the words used, to see whether they are, of themselves, sufficient to create a trust; and, secondly, see whether there is anything in the context sufficient to change their effect.

Are, then, the words themselves sufficient to create a trust? The only rule invoked on this point, is one which is admitted by all the authorities, both ancient and modern, English and American; it is, that if the words, in their natural, ordinary and familiar sense, show that the testator intended that the trust should be executed, and not that it should be left to the mere discretion of the first taker, then a trust is created.—*Ellis v. Ellis*, 15 Ala. 302; *Harrison v. Harrison*, 10 Sm. & Mar. 471; *Gilbert v. Chapin*, 19 Conn. 351. In determining what intention is disclosed by particular words, it is an unsafe rule, ordinarily, to rely much on adjudicated cases, unless the precise words in controversy were construed; for “will cases have no brothers,” and the law of one will is never the law for another different will. But, when we find a large number of concurring decisions, all holding language confessedly weaker in effect sufficient to create a trust, these cases will furnish a strong argument why the same effect may safely be attributed to far stronger words; and English cases, so far as they have not been overruled or impaired by modern decisions, may be safely relied on. The utmost extent of the modern authorities has been to repudiate all cases in which words, expressing in their ordinary import a simple recommendation, hope or confidence that the trust might be executed, but leaving its execution to the discretion of the first taker, have been held to create a trust; and the ground of this repudiation is, that to make a trust imperative, which was intended to be discretionary, is just as much a violation of the testator's intention, as to make a trust discretionary which was intended to be imperative.—2 Story's Equity, § 1069. Leaving out of view, then, all the cases which could fairly



come within the discarded decisions, we cite the following, as a few of the instances in which far weaker words have been held to create a trust: *Harrison v. Harrison*, 2 Grattan, 14; *Lucas v. Lockhart*, 10 Sm. & Mar. 471; *Hunter v. Stembridge*, 12 Geo. 194; *Tolson v. Tolson*, 10 Gill & John. 159; *Malim v. Keighley*, 2 Vesey, jr. 334; *Pierson v. Garnett*, 2 Bro. & C. C. 230; *Eels v. England*, 2 Vernon, 466; *Forbes v. Bull*, 3 Mer. 436. On the other hand, no case has been cited, in which words as strong as those now under consideration have been held insufficient to create a trust.

Passing from the authorities, to a consideration of the scope and effect of the words themselves: It is asked, if the testatrix intended the trust to be imperative, why make any trust at all? why not give the property directly to Means? It might as well be asked, on the other side, why insert this clause in the will at all, if the testatrix did not intend that it should be acted on? But it is a full answer to the question to say, that the law never inquires, in construing a will, whether there was not some plainer or easier way for the testator to have reached the end proposed. If it did, every clause in a will would be held void, if the supposed intent could have been better executed in some other way. No court ever construed and gave effect to a will, where it could not have pointed out some simpler road to the result intended by the testator. If the clause now in question was intended to be discretionary, we might reasonably expect that discretionary words would have been used. Is that the character of the words, "wish and will that he shall give," when taken in their ordinary and familiar sense, and considered in connection with the circumstances under which they are used? They are used in an instrument which purports to be a testamentary disposition of property. What is the ordinary and familiar meaning of the word *will*, when used under these circumstances? Whether called directory or imperative, it means that degree of determination which is sufficient to carry the property in the direction indicated, and is so apt and appropriate to describe such determination, that it has given a name to testa-

mentary dispositions of property. A will is so called, because it expresses *the will* of the maker as to the direction which his property shall take. In this case, the testatrix commences her will with the words, "*It is my will, wish, and desire;*" evidently using them as testamentary words, fit and appropriate to express that degree of determination which would insure an execution of her intention; and when she afterwards uses the words, "*It is my wish and will,*" the fair presumption is, that they were used in the same sense. The word *shall*, also used in the clause, points strongly to an imperative intention; importing, according to the dictionary and common usage, command and determination, and being utterly inconsistent with the idea of discretion. If the testatrix intended to make a mere moral suggestion or recommendation to her husband, to be acted on or not at his discretion, it is strange that she should have selected words which, in their ordinary sense, are imperative, and which she had herself used in an imperative sense, in the commencement of her will. If a person, having the power to command another, should say to him, 'It is my will that you shall do this thing,' this would certainly be deemed imperative by all reasonable rules of construction.

If, then, the words of the clause are sufficient to create a trust, is their effect destroyed by the preceding sentences of the will? It is an old and well-settled rule of construction, that every clause and word in a will must, if possible, receive such a construction as will reconcile it with every other word and clause. If the clause here in controversy creates a trust, its force and effect cannot be destroyed by any other clause, at least until all reconciliation between them becomes impossible. If the previous estate given to McRée, "his heirs and assigns," were of an absolute character, this would not prevent the trust from being upheld, if the words creating it are imperative.—See the cases cited by the chancellor on this point. But it is confidently insisted, that the absolute character of McRée's estate is perfectly consistent with the trust in favor of Means. In this point of view, the

words which seem to enlarge McRee's estate are entitled to no weight; because, when a fee is given by deed or will, its ampleness cannot be increased by any words giving an express or implied power of disposition. An unlimited power of disposition is a legal incident of every fee; and this applies as well to a conditional and qualified fee simple, as to an absolute fee simple,—the only distinction between them being in “the perdurableness of the same.”—1 Co. Litt. 583. The simple question, then, is, whether there is any inconsistency between a previous fee and an executory devise limited thereon upon a contingency; and the mere statement of this question is its own solution. The words creating the fee are referred and give character to the estate in the event the contingency never happens, while the words creating the devise over apply to and fix the character of the estate in the event the contingency does happen.

To apply these principles to the case at bar: Full power and effect are attributed to all the words used in vesting the estate in McRee, by construing them as a description of the fee which he was to take; and full force and effect are allowed to all the words used in the devise over, by construing them to operate only on the happening of the contingency which defeats the previous estate. This construction harmonizes every word and clause in the will, and no other construction does; it carries out the whole intention of the testator, and no other does. The case of *Webb v. Woolls*, cited for appellants, and other similar cases, holding that the absolute character of the previous estate must be looked to for the purpose of restraining the subsequent words raising the trust, are thus shown to be inapplicable. In those cases, there was no previous fee given, which was merely made defeasible on the happening of a contingency on which the trust was to take effect: in all of them, the trust, if valid, must be executed at all events; and hence the previous absolute estate was in no event consistent with the trust. But here the case is different: the previous absolute estate has its full scope and operation, except in the single event of the happening of the contingency which is to defeat it;



the trust is not to operate at all, until the previous absolute estate has ceased to exist. The case of *Pierson v. Garnett*, 2 Bro. C. C. 225, in which the same argument was made as to the force of the previous absolute estate, is precisely in point.

It is argued, that the pecuniary legacy to Means is a charge upon McRee's estate, to discharge which may require a greater estate in McRee than is given him by the construction above contended for. But the vice of this argument is two-fold: In the first place, the rule invoked does not apply, where the ulterior interest is limited to the same party who is entitled to the previous charge; and, in the next place, the entire estate is not given to McRee subject to the charge, but the \$5,000 is first set apart to Means, and the balance then given to McRee subject to no charge.

2. There is no repugnancy between the estate of McRee and the devise in favor of Means. The doctrine of repugnancy only applies, where the absolute estate is first given, and the testator then attempts to give an ulterior interest in the same property to another, while leaving the first estate in its full operation and amplenness; as where a fee is given to A., with remainder in what he dies possessed of to B. It never applies to a case in which the subsequent limitation operates as an infringement upon the fee previously given.—*Hill v. Hill*, 4 Barbour, 427; *Chrystie v. Phyfe*, 22 Barbour, 218; *Theological Seminary v. Cole*, 18 Barbour, 376; *Smith v. Bell*, 6 Peters, 76.

3. The limitation over in favor of Means is not void for remoteness. The doctrine as to remoteness is, that whenever the testator shows an intention to make the words, "dying without issue," &c., relate to the death of the first taker, the event is not too remote; and where the failure of issue is combined with an event personal to the first taker, this is a sufficient indication of such intention.—*Hill v. Hill*, 4 Barbour, 425; *Doe d. Neville v. Rivers*, 7 Term Rep. 277; 1 *Fearne on Remainders*, 482; 2 *Roper on Legacies*, 1555. Moreover, whatever may be the effect of the common-law doctrine of remoteness, section 1302 of

the Code fixes the meaning of the words here in controversy. That section, which must receive the liberal construction applied to all remedial statutes, construed in connection with other provisions of the Code, must be held to embrace executory devises.—Winchester's case, 3 Co. 4; *Alexander v. Worthington*, 5 Md. 485; 12 Geo. 530; *Sedgwick on Statutes*, 238, 317.

A. J. WALKER, C. J.—The will of Martha Ann McRee contains a clause in the following words: “3d. *I give, bequeath and devise all the balance of my property and estate, both real, mixed and personal; also all choses in action, and chattels, to my beloved husband, Caleb P. McRee, to have and to hold said property and estate, real, mixed, personal, choses in action and chattels, to him, the said Caleb P., his heirs and assigns forever, to his use, behoof, and benefit, in fee simple. BUT, SHOULD MY SAID HUSBAND DIE WITHOUT ISSUE OF HIS BODY, IT IS MY WISH AND WILL, HE SHALL GIVE ALL OF SAID PROPERTY TO ROBERT P. MEANS.*”

Caleb P. McRee having died intestate, and without descendants, the title to the property bequeathed to him depends upon the question, whether there is a valid limitation over to Robert P. Means; and that is the question of this case.

[1.] In the investigation of the question just stated, the first point of inquiry which presents itself, is, whether the words, “it is my wish and will he shall give all of said property to Robert P. Means,” left it discretionary with McRee to give or not to give to Means, or imposed it upon him as a duty to give the property; or, in other words, whether the testatrix has simply made a suggestion or recommendation, which might be obeyed or disobeyed, or has created an obligatory trust, which a court of chancery will enforce. The intention of the testatrix, as deduced from the words themselves and from the context, must control this, as it should all other inquiries involving the construction of wills. In our argument we shall adopt, without questioning or affirming its correctness, the principle, that the words are to be understood “in their natural, ordinary and familiar sense,” and

will not attempt to draw from the ancient English cases any artificial rule for their construction.—Ellis v. Ellis, 15 Ala. 296; 2 Story's Eq. Jur. § 1069.

What, then, is the natural, ordinary and familiar sense of the words "wish and will?" Do they import an imperative requisition that McRee should give the property to Means, or are they merely significant of a moral suggestion to that effect? The two words, "wish and will," are both employed by the testatrix in the order in which we present them. She first expresses her "wish," and then her "will." The former of the two words, in its common acceptation, is better adapted than the latter to convey the idea of a request made, which may or may not be granted. That, perhaps, is the sense in which it is most generally used in conversation. But the testatrix has not stopped with the use of this word, significant of petition. She has added another and more emphatic word, "will." The question, why was she not content with the former or the two words, is suggestive of the conclusion, that it was designed to add the mandate of one having a right of command to the force which a mere request might carry. And that consideration is the more significant, because the additional word was, at all events, unnecessary, if it was designed to make a compliance with her request a discretionary matter.

*Will* is sometimes used as the synonym of choice, wish, pleasure; but it is also used frequently in the sense of command, direction, determination, and resolution. It has, when found in testamentary papers, a universally received mandatory signification. Swinburne's definition of a testament is, "a just sentence of our *will*, touching that we would have done after our death."—1 Swin. on Wills, 4. Again, the same author says, (page 19,) "the *will*, or meaning of the testator, is the queen or empress of the testament." The same definition is also given by other authors.—10 Bacon's Abr. 479, Bouvier's Law Dictionary.

In *Gilbert v. Chapin*, 19 Conn. 351, the word *will* is used in contra-distinction to precatory language, as will be seen by the following quotations. "It is said that preca-



tory language, or words of recommendation, are expressive of a testator's *will* and intention. It is true that such forms of expression declare a *wish*, a *preference*, but not a *will* in its appropriate sense. They express an intention, or rather a desire, not absolutely, but with a qualification or condition, that such desire shall nevertheless be subject to the future discretion and action of the devisee. And the distinction between this and an *imperative direction*, which, in legal parlance, is a *will*, is very intelligible and clear." This extract indicates an opinion of the Connecticut court, that "will" is the antithesis of words of recommendation and request, not creating a trust, and carries with its use an imperative direction.

The same meaning has also been attributed to the word in South Carolina, where it is spoken of and distinguished from "wish."—*Brunson v. Hunter*, 2 Hill's Ch. 490. Chief-Justice Marshall had the same view of the import of the word, for he said: "The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically *the will* of the person who makes it, and is defined to be the declaration of a man's intentions, which he *wills* to be performed after its death."—6 Bacon's Abr. 16; also, 2 Black. Com. 499; *Eels v. England*, 2 Vernon, 466; *Forbes v. Ball*, 3 Mer. 436.

The common acceptation of the word *will* corresponds with the meaning adopted by law-writers. There is no other word of more common and familiar use to describe the mental operation involved in the act of making a bequest of property. While the books abound in cases, where words less imperative than *will* have been held to create trusts, we have not found, and the industry of counsel has not produced, a single case in which "*will*" has not been treated as mandatory. The word "will," we decide, therefore, *ex vi termini* imports an obligatory direction by the testatrix. Judge Story, in his *Commentary on Equity Jurisprudence*, said, that words of recom-

mentation, and others precatory in their nature, imply a discretion, as contra-distinguished from peremptory orders; and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them.—2 Story's Eq. § 1069. That principle does not interfere with our conclusion. We do not regard the words here as being, *per se*, precatory words, or words of recommendation. The word "*will*" does not, of itself, import a prayer, request, entreaty or recommendation to another; and is, therefore, not one of those words which, Judge Story thinks, ought to be regarded as addressed to the discretion, unless a different sense is irresistibly forced upon it. In the two cases of *Eels v. England*, and *Forbes v. Ball*, *supra*, in which the word *will* occurs, it was not declared to be a precatory word; but in both cases, the trusts were maintained.

While the word "*will*," *per se*, has an imperative force, we do not doubt that its meaning may be controlled by the context, and that the other parts of the will might be such as to require a different understanding of it. An argument in favor of withholding from the words "*wish and will*" an imperative signification, is drawn from the fact, that McRee is under the clause to "*give*:" "*It is my wish and will he shall give*," &c. The argument would certainly be entitled to great force, if *give* were only used to designate a purely voluntary act. But the word is appropriate to describe the act of transferring the title of property, without a compensation, under a power coupled with a duty of performance. If it is by the will now before us made the duty of a first taker to transfer the property to a given person, it would involve no perversion of the word to call that act a gift. Indeed, it is a gift from the testatrix, through the agency of a trustee, not the less so than it would have been had the agency of an executor been employed. If the testatrix had said, '*I direct that he shall give*,' no one would have doubted that *give* was simply designed to describe the act of transfer in obedience to the requisition of the will. Such language would not essentially differ from that before us, and the proper construction seems equally obvious.

Another objection made to the allowance of an obligatory meaning to "will," is, that in other clauses, in which the testatrix manifestly designs to effect a complete bequest, she has used different words—in two of the clauses, "give, bequeath, and devise." In this objection there can be no force, if we regard "*will*" as an operative word of devise. There is a rule, which seeks for a word the same signification, where it occurs more than once in the will. But there is no rule which inhibits the use of different apt words to convey the same meaning, in different parts of the will.

[2.] The argument against the conclusion that the testatrix designed to create a trust in favor of Means, which has struck us with most force, is, that the terms describing the title vested in McRee are inconsistent and irreconcilable with the words by virtue of which Means claims, if those words create a trust; and that a reconciliation may be effected, by imputing to the testatrix a design simply to make a request in favor of Means. This point is kindred to another made for the appellant. The latter point is, that an unlimited power of disposition is bestowed upon McRee, to which a trust in the contingency of his dying without issue would be repugnant, and therefore void. These two points are met by the same argument, and may be considered together; for, if the rights and powers bestowed upon McRee are not legally inconsistent with the trust claimed by Means, there is neither repugnancy nor a necessity for imputing to the words an unusual meaning.

The bequest to McRee is of all the balance of the property, to have and hold to him, "*his heirs and assigns, forever, to his use, behoof, and benefit, in fee simple.*" The bequest claimed for Means is of the same property, in the contingency of McRee dying without issue of his body. The two occur in the same clause of the will. Is the latter void on account of its repugnancy to the former? The limitation over in favor of Means, if valid, is an executory devise. It is a principle of law, too well settled to be controverted, that an absolute power of disposition or alienation in the first taker defeats a limitation over by



way of executory devise.—Flinn v. Davis, 18 Ala. 132; Weathers v. Patterson, 30 Ala. 404; Denson v. Mitchell, 26 Ala. 360; 4 Kent's Com. (m. p.) 270. This principle does not assert, that if an estate in fee is given, there can not be a subsequent limitation over by way of executory devise, notwithstanding the right of alienation and disposal is incident to every fee. If such were the effect of the principle, it would destroy altogether that class of executory devises which take effect in defeasance or abridgment of the prior estate. It is settled, that by an executory devise a fee may be limited after a fee, or a limitation may take effect in qualification, abridgment, or defeasance of the preceding estate.—4 Kent's Com. 297; 6 Green. Cruise on Real Property, 366; Marks v. Marks, 10 Mod. 419; Pells v. Brown, Cro. Jac. 590; Isbell v. Maclin, 24 Ala. 315; Fearne on Remainders, 13, 371.

In the case of Pells v. Brown, *supra*, which is the leading case upon the subject, the devise was to Thomas and his heirs forever, and, if Thomas died without issue, then over; and the limitation over was held good as an executory devise. The proposition, therefore, that the power of disposition incident to every fee defeats an executory devise limited upon it, is not maintainable; and the principle, that where there is an absolute power of disposition, the limitation over is repugnant and void, must not be understood to assert that proposition.

What is meant by the absolute power of disposition which defeats an executory devise, can best be ascertained by referring to the reason upon which the principle is founded. One of the distinguishing properties of an executory devise is its indestructibility and its total exemption from the power and control of the first taker.—Fearne on Rem. 418–419–420; 4 Kent's Com. 297. As a consequence of this characteristic of executory devises, when the testator's intention to place the limitation over under the power of disposition of the first taker appears, the executory devise is void. The absolute power of disposition, which defeats the limitation over, is, therefore, a power to destroy it by alienation, and not merely a power to alien the estate vested in the first taker. This

X will be apparent by a recurrence to the authorities, which show that an absolute power of disposition makes the limitation over repugnant, only because an executory devise is indestructible; and that the doctrine of repugnancy never has been applied, except in cases where the power of disposition infringed the limitation over.

Kent's statement of the doctrine is as follows: "The executory interest is wholly exempted from the power of the first devisee or taker. If, therefore, there be an absolute power of disposition given by the will to the first taker; as if an estate be devised to A in fee, and if he dies *possessed* of the property without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should leave, or without selling or devising the same; in all such cases, the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is *inconsistent* with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise can not exist under an absolute power of disposition in the first taker."

To prove that, in every case in which the limitation over has been held void for repugnancy, there was an express or implied power of disposition inconsistent with it, and infringing it, we make the following succinct statement of the point decided in several English and American cases. In *Cuthbert v. Purrier*, 4 Jac. (4 Cond. Eng. Ch. R.) 415, the power of alienation inconsistent with the executory devise was given, by making the intestacy of the first taker one of the contingencies upon which the limitation over was to take effect. Such is the view taken of the case in *Keyes on Chattels*, § 154; and it is the only manner in which it can be reconciled with the other cases. So the limitation was repugnant in *Bourn v. Gibbs*, 1 Russ. & M. 615, (5 Eng. Ch. 615,) because it was limited upon the contingency of not being disposed of by the first taker in her life time, or by her will. So, also, in the *Attorney-General v. Hall, Fitzgibbon's R.*, the first taker had the power of alienation and consumption, because the limitation was of so much as he might die possessed,

and the limitation was therefore repugnant.—Keyes on Chat. § 146. The limitation over was declared void in *Ross v. Ross*, 1 Jac. & Walker, 154, because it was limited upon the contingency of the first taker not disposing of the property by will or otherwise. In the case of *Meredith v. Heneage*, 1 Sim. 543, the testator gave the property to his wife, “*unfettered and unlimited* ;” that, together with some other expressions in the will, was deemed sufficient to justify the conclusion, that certain words of entreaty which followed were not designed to create a trust, and that the wife took the absolute estate. The words “unfettered and unlimited” were regarded as showing the intention that the wife should have the power of disposition of the entire estate, and thus leave nothing for the operation of a trust limited over. This case, therefore, sustains the proposition now in hand. Yet it is proper to remark in reference to it, that it does not afford a criterion for the construction of the language before us. The words “unfettered and unlimited” might well be deemed sufficient to show that no trust was created by words of entreaty which follow, and yet be insufficient to show that no trust was created by mandatory words, such as “will,” in this case. So, too, those words, in connection with other expressions of the same tendency, might be sufficient to overcome any force of following words of entreaty, and to show a power of disposition qualified ; and yet be insufficient to show that no trust was created by mandatory words, such as “will” in this case. “Unlimited and unfettered” were regarded as negating the intention of the testator to limit the wife’s estate by imposing trusts which it was attempted to imply from ambiguous language.

In the United States, limitations over have been held void for repugnancy, where the contingency was the death of the first taker, “without giving, devising, and bequeathing by will, or otherwise selling or assigning the estate, or any part thereof.”—*Jackson v. Robbins*, 16 Johns, 538, where the limitation was of such property as the first taker died possessed of ; *Jackson v. Bull*, 10 Johns, 19, where the limitation was of such estate as the first taker



might leave; *Ide v. Ide*, 4 Mass. 500, where the first taker had an express power to dispose of the property at discretion while she lived and at her death; *Newland v. Newland*, 1 Jones' (N. C.) Law, 463, where there was an express provision that the property was to be at the disposal of the first taker; *Ferris v. Gibson*, 4 Ed. Ch. 710, where the limitation over was of all the property, if any remained; *Ramsdell v. Ramsdell*, 21 Maine, 288, where one of the contingencies was, if the first taker should not sell the land; *Melson v. Doe*, 4 Leigh, 408, where the limitation was of so much of the estate as might remain undisposed of by the first taker; *Riddick v. Cohoon*, 4 Randolph, 547; see, also, *Williams v. Jones*, 2 Swan, 620; *Pushman v. Filleter*, 3 Ves. 7; *Davis v. Richardson*, 10 Yerg. 290; *Cook v. Walker*, 15 Geo. 457; *Hill v. Hill*, 4 Barb. 427; *Chrystie v. Phyfe*, 22 Barb. 218; *Theological Seminary v. Cole*, 18 Barb. 376.

The citation of these cases, and the reasoning upon which they proceed, are abundantly sufficient to show that the *absolute* power of disposition in the first taker, to which a limitation over is repugnant, is a power to dispose of the entire estate, including the limitation, and in destruction of the limitation. Such power of disposal seems to be called absolute, in contra-distinction to the power of disposition of a defeasible fee vested in the first taker. The power of alienation, incident to the vesting of a fee in the first taker, is not inconsistent with the limitation over; for, as the limitation over may take effect in defeasance of the fee, so it may of an estate conveyed under his power of alienation. It may operate not only against the first taker himself, but also against an alienee. The bestowment of a fee upon the first taker indicates no intention of the testator to give a power to destroy the limitation over. The language vesting a fee in the first taker is reconcilable with that creating the limitation over, upon the supposition that the latter is a qualification of the former. It is true, as contended by the appellants' counsel, that words which create a fee-simple title, of themselves, import the vesting of an estate subject to no defeasance or condition; but that does not interfere with the other

doctrine, that such words may be qualified by words creating a limitation over by executory devise; for Blackstone, the appellants' authority for the effect of a fee-simple title, gives as an example of an executory devise, a devise to A. and his heirs, but if A. dies before the age of twenty-one, to B. and his heirs.

What we have already said shows that there is no repugnancy because the estate of the first taker is to him and his heirs forever in fee simple. They do nothing more than appropriately describe a title in fee simple. But the testatrix has employed other words. The estate is to him, "his heirs and *assigns* forever, to *his use, behoof and benefit*, in fee simple." *Assigns, to his use, behoof and benefit*, cannot be construed as evincing a design to clothe the first taker with the power of destroying the limitation over. Certainly those words evidence an intention that the first taker should have the use and benefit of the property and the power of alienation; but they add nothing whatever to the force of the accustomed words used in the creation of a fee-simple title. All that they import would have been implied without them. They are added here, as such words frequently are in deeds and wills, from a superabundant caution. There is no conceivable reason why a testatrix should be allowed to qualify an estate in fee simple, unaccompanied by those words, and yet be denied a similar power when they are added. Those words, as well as the accustomed words descriptive of a fee simple, all find their operation in describing the estate and the powers of the first taker, and those coming in under him if the contingency upon which the executory devise is limited does not occur.

The cases fully sustain the construction which we place upon the words *assigns, use, behoof and benefit*. In *Parsons v. Baker*, 18 Vesey, the devise was to the first taker, "his heirs and *assigns*, forever;" and yet the limitation over upon the contingency of his having no child or children was sustained. The decision in *Pierson v. Garnett*, 2 Bro. Ch. 38, where the bequest was to P. P., "his executors, administrators and assigns," was the same. The master

of the rolls said: "I think no stress can be laid on the words *executors, administrators and assigns.*"

The decision by Chief-Justice Marshall in *Smith v. Bell*, 6 Peters, 68, construed a will in which the testator gave his personal estate to his wife, "to and for her own use and disposal absolutely; the remainder after her decease to be for the use of the said Jesse Goodwin." It was decided, that upon the wife's death, the property went to Jesse Goodwin. The opinion contains the following remarks, as to the qualification of the estate given to the wife: "The first part of the clause, which gives the personal estate to the wife, would undoubtedly, if standing alone, give it to her absolutely. The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words *disposal absolutely* may have their absolute character qualified by restraining words, connected with and explaining them to mean such absolute disposal as a tenant for life may make. If this would be true, provided the restraining words *for her life* had been added, why may not other equivalent words, which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation?" This entire reasoning is obviously applicable to the point now under consideration, and is entitled to peculiar weight, because the power of disposition was given by an expression much stronger than "*assigns.*" The same will seems to have been construed, with a different result, by the supreme court of Tennessee, in *Smith v. Bell*, Mar. & Yerg. 302, to which book we have no access; but we infer from remarks upon the case, in subsequent decisions by the same court, that the phrase "*absolute disposal*" was regarded as conveying not merely an ordinary power of disposition, but such as would include and might de-



stroy the limitation, and was, therefore, irreconcilable with it.—Richardson v. Davis, 10 Yerg. 290. While the adjective *absolute*, in that case, may have enlarged the power of disposition, we apprehend that the decision asserts no principle adverse to our argument in reference to the construction of this will, which contains no such word. Besides, the authority of the case is weakened, if not destroyed, by the conflicting decision of the supreme court of the United States, delivered by Chief-Justice Marshall.

In the case of Hill v. Hill, 4 Barb. 419, the devise was to "Thomas Hill, and to his heirs and assigns forever;" with a prohibition of sale within fifteen years unless to one of the testator's children, and with a limitation over in the contingency of death without issue at the time of his death. Notwithstanding the word "assigns," the court, after citing many cases, in which the first taker was held to have taken the absolute property, said: "In all these cases of the giving of the first taker an absolute property, there was an attempt to give to the executory devisee such part of the property as should not be sold or disposed of by the first devisee. But the case before us is of a different character. It is true it commences by giving the property to him and his heirs forever, but the expression is qualified by the subsequent limitation. The condition on which the estate is given, that Thomas shall not sell or convey it within fifteen years, does not enlarge the estate. The testator did not devise the estate to Thomas, his heirs, &c., absolutely, but on two express conditions: one, that he should not die without lawful issue, and the other, that he should not alien within fifteen years after the death of the testator, except to some one of the testator's children. The *jus disponendi* was, therefore, not *absolute*, but *conditional*. If Thomas sold to one of his brothers within the fifteen years, or to any other person after that time, the grantee, in either case, would take the land subject to the same contingency, that is, the death of Thomas without lawful issue; and upon the happening of that contingency, such grantee would be divested of the estate." We quote thus largely from this last case,

because it seems to cover the precise point of discussion in this case.

In the case of *Webb v. Wooll*, 13 English L. & Eq. 63, a case relied upon by the appellants' counsel, there was a bequest to the testator's wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence that she would dispose of the same for the joint benefit of herself and the testator's children. There was in this case no question as to a limitation, but the controversy was between the widow of the testator and his children, as to whether the right of the former was exclusive, or in trust for herself and the children; whether the gift to the wife was of a beneficial interest, or whether she took only as a trustee. In deciding this question, the words *assigns, executors and administrators*, were allowed much force in producing the conclusion, that the wife took a beneficial interest, and that the following words did not impose a trust upon her. The same effect may be allowed to the word *assigns* in this case as was allowed in that, without affecting our argument. It would simply show that the first taker had a beneficial interest in the property,—which, of course, our argument does not deny.

In *Meredith v. Heneage*, 1 Sim. 543, the word *assigns* also occurs, but is not noticed in the opinion at all; but the argument is drawn from the fact, that the estate of the devisee is declared to be “unlimited and unfettered,” and some other expressions of the will. No such words occur in the will now before us, nor is there any equivalent expression. “Unlimited and unfettered,” in connection with other things, seems to have been regarded as negating any intention to “fetter and limit” the estate by imposing trusts upon the devisee.

We think the reasoning and authorities above adduced fully maintain our position, that there is no repugnancy, which makes the limitation over void, and that the executory devise is sustained by a construction which does no violence to the language which describes the estate of the first taker.

[3.] The second clause of the will gives a legacy to

Means, of five thousand dollars, to be paid in five equal installments. The next clause gives all the "balance" of the property to McRee. Upon these two clauses it is argued for appellants, that the legacy of five thousand dollars is so charged upon McRee's devise, that the bequest to the latter must, by implication, be enlarged into an absolute estate. The doctrine is well established, "that where a devisee, whose estate is undefined, is *directed* to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that, if he took an estate for life only, he might be damaged by the determination of his interest before reimbursement of his expenditure."—2 Jar. on Wills, (m. p.) 171, (top) 125. A distinction is drawn, between a charge upon the estate, and a charge upon the person of the devisee: the latter enlarges the estate by implication; the former does not. The distinction rests upon the satisfactory reason, that where the person of the devisee is charged in respect to the estate, there is a personal liability which may continue after his death; but it is otherwise where the charge is upon the estate. The distinction is well settled.—Collier's case, 6 Reports, 16; Jackson v. Bull, 10 Johns. 148; Jackson v. Martin, 18 Johns. 31 Spraker v. VanAlstyne, 18 Wend. 200; Olmstead v. Harvey, 1 Barb. 112. Now it is certain, that the legacy of five thousand dollars is not charged personally upon McRee in reference to the estate bequeathed to him, but is to be paid by the executors out of the general assets of the estate. The doctrine of enlargement by implication from a charge is, therefore, not available to the appellants.

[4.] It is contended, that the contingency of dying without issue of the body implies an indefinite failure of issue; and that, therefore, the executory devise is void for remoteness. We need not inquire what judgment the common law would pronounce upon that question, for we regard it as settled by the Code. Section 1302 of the Code is in the following language: "Where a *remainder* in real or personal property is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word *heirs*, or *issue*, must be construed



to mean heirs or issue living at the death of the person named as ancestor." Notwithstanding remainders are alone expressly mentioned, this statute must be construed to include executory devises. This statute is almost a literal copy of section 22, title 2, part 2, chap. 1, art. 1, page 724, of the New York Revised Statutes, and is evidently borrowed from it. The New York statute has only the word "*remainder*;" yet in New York the courts have uniformly regarded it as including executory devises. *Miller v. Macomb*, 26 Wend. 229; *Hill v. Hill*, 4 Barb. 424; *Ferris v. Gibson*, 4 Edw. Ch. 707. It was unimportant, after the insertion of section 1301 of the Code, that the distinction between executory devises and remainders should be observed, for it abolishes the distinction between the two.—4 Kent's Com. 272. That section gives to contingent remainders the same properties and effect as executory devises. It would be a most unreasonable construction, which would say that the distinction between executory devises and contingent remainders is broken down, and that they have the same properties and effect, and yet the same words shall have altogether a different import when the question of remoteness is to be determined. Executory devises are within all the evils to be avoided and benefits to be accomplished by the statute. They are within the spirit and intent of it; and we decide, with the New York court, that remainder was used in its ordinary, rather than in its strict legal acceptance, and that it embraces executory devises. We not only have the authority of our own observation, but the highest legal authority, for saying that "the term remainder is sometimes used in a lax sense to denote any kind of subsequent interest, or the limitation thereof."—2 Fearn on Rem. 54.

It is argued, that because some of the articles belonging to the estate were such as would be consumed in the specific use of them, there is an inconsistency between the estate of the first taker and the limitation over. Such inconsistency could only exist upon the supposition, that the articles *quæ ipso usu consumuntur* were intended to be specifically enjoyed. That intention is not manifested in

the will, nor is it deducible from it according to the principles of construction which prevail in such cases.—*Harrison v. Foster*, 9 Ala. 955; *Keyes on Chattels*, §§ 20–23, pages 17–32; 4 Kent's Com. (m. p.) 353, (top) 439–440.

The counsel have not argued in their briefs any question arising on the account ordered by the chancellor, and we therefore do not pass upon it. If it is desired that we should consider the account, our attention may be called to it by written arguments during the term. The chancellor's decree is affirmed.

## MASON vs. PATE'S EXECUTOR.

### [FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Construction of words "bodily heirs" in bequest, as affected by rule in Shelley's case and statutory provisions in this State.*—A bequest in these words, "I request and desire all of my property, both real and personal, to be equally divided between my daughter, Louisa A. Mason, and Franklin S. Pate, who are my true and lawful heirs;" and "I will and desire the property which my daughter obtains from this my will, at her death to descend to her bodily heirs,"—would, under the law existing in this State prior to the adoption of the Code, vest the absolute title to the property in the first taker; but, under the provisions of the Code, (§§ 1302, 1304, 1299,) vests only a life estate in the first taker.
2. *Respective rights of tenant for life and remainder-man; questions of jurisdiction and practice.*—Where money is bequeathed to one person for life, with remainder to another, the probate court has no power to direct its payment to the tenant for life, on his execution of a refunding bond; but should leave him to seek redress in chancery, where the proper practice is to allow him to take the money, on the execution of a suitable bond, and, in the event of his failure to do so, to lend it out on interest, and pay the interest to him annually.

### APPEAL from the Probate Court of Sumter.

IN the matter of the final settlement and distribution of the estate of Samuel R. Pate, deceased, by John McInnis, the executor. The will of said decedent, which was dated the 9th November, 1854, after giving directions

for the payment of funeral expenses and debts, contained the following provisions: "After these debts are all paid, I then request and desire all of my property, both real and personal, to be equally divided between my daughter, Louisa A. Mason, and Franklin S. Pate, who are my true and lawful heirs. I will and bequeath unto my wife, Rachel Jane Pate, who has left my bed and board, the sum of one dollar; also, whatever clothing or furniture she brought to my house. I will and desire the property which my daughter obtains from this my will, at her death to descend to her bodily heirs. I will and request that my son, F. S. Pate, be allowed to take my negro boy Milan at valuation. I will and request my friend and brother, John McInnis, to be and act as executor of this my last will and testament. In witness whereof," &c. All the personal property belonging to the estate, except the slaves, was sold by the executor, under an order of court, for the payment of debts. The real estate was also sold, under an order of court, on the ground that its sale would be more to the interest of the heirs and legatees than a sale of the slaves; and the sum of \$2128 41, mentioned in the decree of the court as hereinafter stated, was a part of the proceeds of said sale. The slaves were divided, under an order of the court; and on this division there was a difference of \$1488 23, as shown by the decree, in favor of Mrs. Mason, who had two children living at the time of the settlement. On this state of facts, Mrs. Mason moved the court to render a decree in her favor, against the executor, for the two sums of money above mentioned. The court refused to do this, and rendered a decree in these words: "Ordered and decreed, that Louisa A. Mason be allowed the sum of \$1488 23, and interest to the sum of \$138 89, to equalize the division of the negro property, and recover the sum of \$2128 41, making the sum of \$3,755 33; which the executor, in accordance with the provisions of the will of said deceased, is authorized and directed to retain, for the use and benefit of the minor heirs of Louisa A. Mason, unless said Louisa A. Mason shall give bond for the delivery of said sum to her children at her demise." Mrs. Mason reserved



an exception to the refusal of the court to render a decree as asked by her, and she now assigns as error the decree rendered by the court, and the refusal of the decree asked by her.

S. F. HALE, for the appellant.—1. The language of the third clause of the will in this case, independent of statutory provisions, would create an estate tail; it is the appropriate language for that purpose.—*Machem v. Machem*, 15 Ala. 375; *Ewing v. Standifer*, 18 Ala. 400. Section 1300 of the Code then converts this estate tail into an estate in fee simple. Neither section 1302 nor section 1304 applies to the case; there being here no remainder limited to take effect on any such contingency as is contemplated by the former, nor any remainder created or limited over, nor any life estate given, within the purview of the latter section: on the contrary, a simple estate tail is created, which is converted by the statute (§ 1300) into an estate in fee simple. One who seeks to avoid the operation of section 1300 of the Code, must bring himself directly within the saving clause of some other provision.—*Martin v. McRee and Wife*, 30 Ala. 116. The Massachusetts and Kentucky cases, cited for the appellee, are not applicable here; because the rule in Shelley's case does not obtain in Kentucky, and the Massachusetts statute of 1791 is different from ours. Our statute not only abolishes the rule in Shelley's case, but establishes another rule fatal to those claiming in this case as remainder-men.

2. Although Mrs. Mason may have taken only an estate for life under the will of her father, she was nevertheless entitled to the possession of the property, real or personal, which formed the subject of the bequest; and the court could not deprive her of this right, by converting the property into money.—2 Story's Equity, p. 120, note 1; *ib.* § 1213 *a*. In such case, a different rule applies from that which would obtain if the bequest had been of money. The probate court, being a court of law, and therefore incompetent to enforce the equities between the parties, should have rendered an unconditional decree for the appellant,

and left the remainder-men to apply to a court of equity to secure their rights. •

TURNER REAVIS, *contra*.—1. The limitation to the “bodily heirs” of Mrs. Mason is good, without reference to statutory provisions. The will does not create an estate tail, nor is the bequest within the rule in Shelley’s case. Mrs. Mason takes only a life estate by implication, with remainder to the heirs of her body living at her death. The time when the limitation over is to take effect, is expressly limited to the death of Mrs. Mason; as much so as if the bequest had been to her for life, and at her death, if she should have an heir of her body, then to such heir,—in which case, the remainder would have been good. *Bell v. Hogan*, 1 Stew. 536; *McVay v. Ijams*, 27 Ala. 238; *Bowers v. Porter*, 4 Pick. 205; *Williamson v. Williamson*, 18 B. Mon. 329.

2. The bequest is certainly good under sections 1302 and 1304 of the Code, whatever may be its effect independently of those sections. Sections 1300, 1302 and 1304 of the Code, being *in pari materia*, must be construed as parts of one act, and made harmonious and consistent with each other. There can be no difference between a life estate created by implication, and one created by express words. The words of the bequest, therefore, construed by the rules applicable in such cases, create a life estate only in Mrs. Mason, with remainder to the heirs of her body, within both the letter and spirit of section 1304. If the limitation is not good under that section, there is this incongruity in the statutes: a limitation, to take effect on the death of a person without heirs of the body, is good under section 1302, but a limitation to the heirs of the body themselves is not. The only just construction of section 1302 is this: a limitation to the heirs of the body of the first taker is good, because the section limits the estate to the heirs of the body living at the death of the first taker; and a limitation over in default of such heirs is also good. Otherwise, the section would present the anomaly of a good limitation over resting for support upon a bad limitation, and would not allow the second

objects of the testator's bounty to take, while those further removed from his consideration and affections would. The only construction which gives effect to each of these three sections, and makes them harmonious and consistent, is this: as a general rule, estates tail are abolished, (§ 1300;) nevertheless, a limitation to the heirs of the body of the person named as ancestor, means heirs living at his death, (§ 1302,) and is not an estate tail, nor within the rule in Shelley's case; consequently, not only may such heirs of the body take, but a limitation over in default of them is good; and, under section 1304, they all take as purchasers. Moreover, section 1300 cannot properly be said to apply to bequests of personal property, which was not the subject of an estate tail at common law, nor by the statute *de donis*. Limitations of personal property to the heirs of the body were held void, not because they created an estate tail, but because they were so remote as to tend to create a perpetuity, and because they were obnoxious to the rule in Shelley's case.

3. The appellant takes only a life estate in one-half the estate after payment of debts. This residue having been necessarily converted into money, it must be regarded as a legacy of money to one for life, with remainder to another; in which case, the tenant for life is not entitled to the money itself, but only to the interest during his life. 8 Ired. Eq. 99; 7 *ib.* 178; Busbee's Eq. 5; 2 Dev. Eq. 420; 1 Bailey's Eq. 411; 9 Ala. 955; 10 B. Mon. 290; 2 Paige, 123; Keyes on Chattels, §§ 511, 513; Hill on Trustees, 550. Not being entitled to the money, the appellant could not recover it in any court, either of law or equity. Section 1772 of the Code, while giving an additional remedy for the recovery of legacies, does not give any additional right to them. As to this money, the will makes the executor a trustee for the appellant and her children; and on final settlement of his accounts, the court could do no more than ascertain by its decree the amount of the trust fund in his hands. The order made by the court was manifestly necessary to protect the rights of the infant remainder-men, and was authorized by section 1822 of the Code. At any rate, if the order exceeds the authority



conferred by the statute, the error is in favor of the appellant, and, therefore, constitutes no ground of reversal in her favor.

STONE, J.—Although the rule in Shelley's case embraces only titles to real property, yet most of its principles and incidents are, in this country, alike applicable to wills and other conveyances of personal property.—Fearné on Remainders, vol. 2, p. 394, § 714; *ib.* ch. 17, § 1, p. 270; Ewing v. Standifer, 18 Ala. 400; Machem v. Machem, 15 Ala. 373; Darden v. Burns, 6 Ala. 362; Couch v. Anderson, 26 Ala. 676; Powell v. Glenn, 21 Ala. 458; Moffatt v. Strong, 10 Johns. 12. When applied to personal property, the remainder over to heirs, or heirs of the body of the first taker, is declared inoperative, because of its remoteness, or tendency to lead to perpetuity.—Keyes on Ch. §§ 178, 179, 181, 250. In speaking of these rules hereafter in this opinion, we shall style them indifferently the rule in Shelley's case.

Under the influence of this rule, before the adoption of our Code, a conveyance to A. for life, or to A. generally, and at the death of A. to his heirs, vested in A., the first taker, a fee simple in lands, and an absolute title in personal property.—Tucker's Com. 135; Ewing v. Standifer, 18 Ala. 400; McGraw v. Davenport, 6 Por. 327; Couch v. Anderson, *supra*; Isbell v. Maclin, 24 Ala. 315; Horne v. Lyeth, 4 Har. & Johns. 431; Keyes on Ch. § 181; Moore v. Brooks, 12 Gratt. 135; Keyes on Realty, § 71; Scott v. Abercrombie, 14 Ala. 270.

So, a conveyance to A. for life, or to A. generally, and at his death to the heirs of his body, at common law vested in A. an estate in fee tail in lands, and an absolute title in personalty.—Machem v. Machem, 15 Ala. 373; Darden v. Burns, 6 Ala. 362; 1 Fearné on Rem. 463; 4 Kent's Com. (8th ed.) 237; Keyes on Ch. §§ 246, 179, 250; Ld. Chatham v. Tothill, 6 Bro. P. C. 450; Powell v. Glenn, 21 Ala. 458.

The effect of the rule was, in the case of an estate *expressed to be for life*, to enlarge such estate, by force of the words *remainder to heirs or heirs of the body*, into a

fee simple, or fee tail, in the first taker; while, in the case of an estate *not expressed* to be for life, the super-added words, *remainder to his heirs or the heirs of his body*, did not cut down the estate to one for life in the first taker, but only determined the character of the fee, by prescribing the class of heirs to which the inheritance should descend. All such conveyances, then, had the same legal effect, as if the words, *remainder, at his death, &c.*, had been omitted; and the conveyance had read, to A. and his heirs, or to A. and the heirs of his body. The reasons on which the rule rested have been too often expressed to need repetition here.—Fearne on Rem. p. 28, *et seq.*

An examination of the authorities will show, that no particular or technical import was attached to the words *remainder, after his or her death, &c.*; or to the language by which the estate in the first taker was created. The rule was applied to all cases, where an estate for life was given to the first taker, and an attempt made, after its termination, without other more specific words, to vest an estate by purchase in the *heirs, or heirs of the body* of the first taker.—Tucker's Com. 135; Ewing v. Standifer, 18 Ala. 400; Machem v. Machem, 15 Ala. 373; Darden v. Burns, 6 Ala. 362; 4 Kent's Com. 237; Hooe v. Hooe, 13 Gratt. 245.

In several of the States composing this confederacy, estates tail have been by statute converted into estates in fee simple. In our own State, this was done as early as 1812.—Clay's Dig. 157, § 37; Code, § 1300. It will be observed, that our first statute embraced lands and slaves, and the Code uses the words, *real and personal property*. Under the influence of this statute, the phrase, *heirs of the body, or bodily heirs*, in all instruments to which the statute applies, has the same import as the word *heirs* at common law.

If the will of Samuel R. Pate had taken effect prior to January 17th, 1853, Louisa A. Mason would, under the rules stated above, have taken an absolute title in the property therein bequeathed to her. The will, however, did not take effect until after our Code become operative.

The question arises, must that will now receive a different construction?

While the courts of this and the mother country have steadily adhered to the construction, that the terms, *heirs*, *issue*, and *heirs of the body*, unexplained by others in the instrument, are words of limitation, and not of purchase—express only the quantum of interest in the first taker, and create no interest in remainder—they have done so in obedience to an imperative public policy, and a long recognized rule of property. The individual hardship and oppression of the rule, the almost certainty that in many cases the intention of the grantor or testator was thereby defeated, have been often felt. Hence, whenever from the context courts have been able to discern that the word *heirs* meant children of the first taker, or a class of persons who should stand in the relation of heirs to the first taker at the time of his death, the remainder over has been upheld.—4 Kent's Com. (8 ed.) 229.

One ground on which the rule in Shelley's case is supposed to rest, may, with propriety, be here mentioned. We allude to the feudal doctrine of *reliefs*, or composition exacted in feudal times by the lord paramount from the heir, as the price or purchase of his right to take possession of the fee on the death of his ancestor. This source of profit to the feudal lord depended on the nature of the heir's title; whether he took by descent or by purchase. The former conferred the right to demand reliefs, while the latter did not. A desire to foster the landed aristocracy, it is thought, entered into the policy of inclining to regard titles as acquired by descent rather than by purchase.—2 Bla. Com. 65.

The fact that the rule in Shelley's case frequently sacrifices the intention of grantors and testators to a rule of construction, and the further fact that the policy of our country is entirely dissimilar to the feudal policy which prevailed in England when that rule was adopted, have doubtless contributed to the change of the rule, which has been effected by legislation in many of the States composing this Union. Massachusetts, New York and Alabama, have severally given a legislative definition of the



terms, *heirs*, *issue*, and *heirs of the body*, when found in a certain connection. Our own legislation on the subject is contained in sections 1302 and 1304 of the Code, which read as follows:

“§ 1302. When a remainder in real or personal property is limited to take effect on the death of any person, without heirs, or heirs of his body, or without issue, the word “heirs” or “issue” must be construed to mean heirs or issue living at the death of the person named as ancestor.”

“§ 1304. When a remainder, created by deed or will, is limited to the heirs, issue, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, issue, or heirs of the body of such tenant for life, are entitled to take as purchasers, by virtue of the remainder so limited to them.”

The section which is supposed to bear peculiarly upon the question under discussion, is the one last copied, § 1304. It will be observed, that it makes provision only when a remainder “is limited to the heirs, issue, or heirs of the body, of a person to whom a *life estate* in the same property is given.” It is here contended that this section can exert no influence upon the construction of Mr. Pate's will, because that will does not give the appellant a life estate, but an absolute title. With all proper deference, we think the argument proves too much, and hence proves nothing.

Why is it that the will of Samuel R. Pate would not, at common law, create a life estate in Mrs. Mason? The answer must be, because of the rule in Shelley's case. If the will had given the property to her *expressly for life*, and had added the words, *at her death to descend to her bodily heirs*, this, under the same rule, would have given Mrs. Mason, not an estate for life, but an absolute title. Thus construing the language of the statute, and giving proper consideration to the rule in Shelley's case, we would be forced to hold that section 1304 of the Code has accomplished little or nothing; because few conveyances express the estate of the first taker to be for life.

A more rational interpretation of the words, we apprehend, would be to regard the section in controversy as giving and intending to give a legislative definition of the words, *heirs, issue, and heirs of the body*, viz., that they point to, designate and describe the persons who sustain that relation to the first taker at the time the life estate falls in. In construing a deed or will, then, which gives an estate for life, either generally or expressly, and contains the superadded words, *with remainder, or at his or her death, to his or her heirs, issue, or heirs of the body*, we should regard the instrument as containing the additional words, *living, or in being at his or her death*. In other words, we should read the instrument as if it were written, *to A, with remainder, (or, at his death,) to his heirs living at the time of his death*. In this we but substitute the legislative definition for the words found in the deed or will. Thus read, all will admit that the will gives to Mrs. Mason only a life estate; and the statute converts her bodily heirs into purchasers.

Again: The different sections bearing on this question, and which are found on page 283 of the Code, should be construed in *pari materia*. Section 1302 provides for a limitation "to take effect on the death of a person without heirs," &c. Under this section it is manifest, that a conveyance to A., and at his death to his heirs, and if A. should die without heirs, then to B., would, on the happening of the contingency, vest a good title in B. Now, under the construction contended for, would not this be a very strange result? Heirs, in the instrument, would mean "heirs living at the death of the first taker," for the purpose of supporting the remainder over; but would have no such definite meaning, when invoked in support of their own claim as purchasers. A construction which leads to such absurd results, cannot be sound.

The Massachusetts statute of 1791, ch. 60, so far as it affects this case, is not materially different from section 1304 of our Code. It provides, "that whenever any person shall hereafter, in and by his last will and testament, devise any lands, &c., to any person, for and during the term of such person's natural life, and after his death

to his children, or heirs, or right heirs in fee, such devise shall be taken and construed to vest an estate for life only in such devisee, and a remainder in fee simple in such children, heirs, or right heirs; any law, usage or custom to the contrary notwithstanding."

In *Bowers v. Porter*, 4 Pick. 198, the language of the will was, "I give to my daughter, Lydia Bowers, the improvement of my homestead farm," &c., "the said premises to be equally divided between all her legal heirs at her decease." There were no words expressing that the gift to Lydia Bowers was for life, other than those above copied. It was held, under the act of 1791, that Lydia Bowers took only a life estate, with remainder in fee to her children living at her death. Chief-Justice Parker, in delivering the opinion of the court, said: "Without doubt, it was the intention of the legislature, by this statute, to abolish the rule in *Shelley's case*, which had got to be received as the rule of the common law. It is unfortunate that this intention was not more clearly expressed; for it certainly is not wholly without doubt, whether, in order to come within the operation of this statute, the estate for life should not be created by express terms in the will, and also whether the remainder to the heirs should not be expressly, and not by implication only a fee simple. We are inclined to think, however, that when by construction of law a life estate is created, and in the same way a remainder to the heirs or children in fee, this statute will operate to prevent the application of the rule in *Shelley's case*."

We have said that several of the States have by statute repealed or materially modified the rule in *Shelley's case*. See 4 Kent's Com. (8th ed.) pp. 239 to 243. The statute of New York (R. S. vol. 1, p. 725) seems to be confined to real estate, but is, in other respects, substantially the same as our own. Chancellor Kent evidently regarded their statute as an abolition of the rule.—Vol. 4, p. 243, and note.

No peculiar importance can attach to the word "descend," as found in the will of Mr. Pate. It does not necessarily denote inheritance. In a similar connection



it has been construed by this court to mean *to go to*; and we think that is its proper sense in this will.—*McVay v. Ijams*, 27 Ala. 238; *Williamson v. Mason*, 23 Ala. 488; *Greenwood v. Coleman*, January term, 1859.

We hold, then, that section 1304 of the Code applies to all cases, where an estate is given to A. expressly for life, with remainder, or at the death of A., the first taker, to the heirs, issue, or heirs of the body of such grantee or devisee. It also embraces all cases, where an estate is given generally to A., followed by the words, *with remainder*, or *at the death of A.*, (or other equivalent expression,) to the heirs, issue, or heirs of the body of A. In each of these cases, before our statute, a fee or absolute title would vest in A., the first taker; while in each it is morally certain that a life estate only was intended, but which life estate was enlarged into a fee, or absolute title, by force of the rule in *Shelley's case*.—*Bowers v. Porter*, *supra*; *Smith v. Bell*, 6 Peters, 68; *Keyes on Ch.* § 262.

In the application of section 1304 to cases which may arise, it may become material to inquire, whether its provisions embrace conveyances *to A. and his heirs*, *to A. and his issue*, or *to A. and the heirs of his body*. Under the English jurisprudence, a deed of lands to A., without more, conveyed but a life estate. Hence, the word *heirs* was necessary to enlarge the title into a fee. At an early day, the legislature of this state enacted, that "every estate in land, which shall be hereafter granted, conveyed or devised, although words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words." Act of 1812, Clay's Dig. 156, § 33.

The language of the Code is slightly different.—See § 1299. Its exceptional clause is, "unless it clearly appears that a less estate was intended." Now, in the language above supposed, it would not clearly appear that a less estate was intended; and hence, if the subject-matter of the conveyance was lands, A. would take a fee simple.

But this does not meet all the difficulties. Section 1304 applies to personal as well as real property; and the

words *heirs*, *issue*, and *heirs of the body*, are not only not necessary to the vesting of an absolute title in personal property, but are inappropriate to express such intention. Keyes on Ch. §§ 248, 249.

We hold that section 1304 has no application to the case supposed, for the following reasons:

The rule against perpetuities in the enjoyment of personal estate, rested its construction of the words, *heirs*, *issue*, &c., on the indefiniteness of those terms; extending as they do to the remotest generation of persons filling that relation. Hence, the courts, in construing them, could not take the first step, without letting in all the mischiefs against which the rule was intended to provide. When, however, there was anything in the context which showed that by the word *heirs* was meant children, or persons standing in the relation of heirs to the first taker at the termination of the particular estate, such persons have ever been let in as purchasers.—See *Kay v. Connor*, 8 Humph. 633; *Keyes on Ch.* § 246; *Dunn v. Davis*, 12 Ala. 135; *Stone v. Maule*, 2 Sim. 490; *Bell v. Hogan*, 1 Stew. 536; *Powell v. Glenn*, 21 Ala. 458; *Williamson v. Mason*, 23 Ala. 488; *McWilliams v. Ramsay*, 23 Ala. 813; *McVay v. Ijams*, 27 Ala. 238; *Elmore v. Mustin*, 28 Ala. 309; *Fellows v. Tann*, 9 Ala. 999.

In these cases, it will be observed, that the *heirs*, or *issue*, are let in, because the instrument affirmatively shows that those words were employed to designate children, &c. This being the case, it necessarily follows that, if the word *children* had been employed in the cases to which the rule has been held not to apply, such children, and in some cases grand-children, would have taken as purchasers under the conveyance.—See *Keyes on Ch.* § 97.

Now, in the case supposed of a conveyance by will or deed to A. and his heirs, issue, &c., let us substitute for the word *heirs*, the word *children*; the conveyance will then read, 'to A. and his children.' Under such conveyance, A. will not take a life estate, remainder to his children. If A. have children at the time the conveyance takes effect, such children take jointly with their parent,

and after-born children are excluded. On the other hand, if A. have no children at the time his rights under the conveyance accrue, A. takes an absolute title.—*Vanzant v. Morris*, 25 Ala. 285; *Wilde's case*, 6 Coke's Rep. 17 a; *Fellows v. Tann*, 9 Ala. 999; *Spear v. Walkly*, 10 Ala. Rep. 328.

The case we have supposed, then, is not that of an estate in *remainder, limited to the heirs, issue, &c., of a person to whom a life estate in the same property is given*. There is neither a life estate given, nor a remainder limited; but on the contrary, if the heirs, issue, &c., take at all under such conveyance, they take jointly with the ancestor.

The construction above announced leaves an ample field for the operation of section 1300 of the Code, which reads as follows: "Every estate, in real or personal property, in fee tail, now or hereafter created, becomes an estate in fee simple," &c. It controls conveyances *to A. and the heirs of his body*, and converts the estate created thereby into a fee simple in A., instead of a fee tail, as it existed at common law. There may be many other cases within its control.

It results from what we have said, that the probate court of Sumter did not err in holding that Mrs. Mason takes only a life estate under the will of her father.

[2.] The probate court had no authority to render a decree, requiring Mrs. Mason to enter into bond, before she could receive her share of the estate. This will require the exercise of chancery powers;—and in cases like the present, where the subject of the legacy is money, and the legatee takes only a life estate, the probate court should not order the money to be paid over, but leave such legatee to seek redress in the court of chancery. We deem it proper here to remark, that the proper practice in the chancery court would be, to give to Mrs. Mason the option of taking the money, upon the execution by her of a suitable bond; and in case of her failure to do so, then to order the money to be let out on loan, with at least two good and solvent sureties, and the interest collected annually, and paid over to her.—*Keyes on Chat.*



§§ 511, 513; Kinnard v. Kinnard, 5 Watts, 108; Eichelberger v. Barnetz, 17 S. & R. 293; 2 Kent, 354-5; Covenhouse v. Shuler, 2 Paige, 122; Clark v. Clark, 8 Paige, 152; Miller v. Williamson, 5 Md. 219, 233; 2 Story's Eq. Jur. § 845 *a*; 2 Lomax on Ex'rs, 71, 139; Young v. Miles, 2 B. Monroe, 287; Smith v. Badeen, 2 Dev. Eq. 420; Jane v. Simmons, 7 Ired. Eq. 176; Graham v. Roberts, 8 Ired. Eq. 101; Taylor v. Bond, Busbee's Eq. 25; Freeman v. Cook, 6 Ired. Eq. 378.

The judgment of the probate court is reversed, and the cause remanded.

## PARKMAN'S ADM'R vs. AICARDI & TOOL.

[BILL IN EQUITY TO RESTRAIN TENANT FROM SUB-LETTING HOUSE.]

1. *When equity will restrain lessee from sub-letting premises.*—A court of equity will restrain the lessee of a store, which had been rented and used by him as a drug-store, from sub-letting the premises to another to be used for retailing spirituous liquors, when it appears that, although the contract of lease did not restrict the use of the house to any particular business, the lessee fraudulently applied for a renewal of his lease in his own name, after having agreed to sub-let the house to a licensed retailer, because he knew that the landlord would not lease the premises for that purpose.
2. *When administrator of insolvent estate may sue.*—The administrator of an insolvent estate, whose intestate had an undivided half interest as tenant in common in a block of stores, may maintain a bill in equity against the lessee of one of the stores, to restrain an improper sub-letting, which would impair the value of the property, and diminish the amount of the rents.
3. *Non-joinder of parties plaintiff.*—Conceding that a surviving tenant in common in land should be joined as co-plaintiff with the administrator of his deceased co-tenant, in a suit instituted by the administrator, yet his absence from the State is a sufficient reason for making him a defendant.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Mrs. Maria R. Parkman, as the administratrix of the estate of her deceased husband, Elias Parkman, against Aicardi & Tool, A. E.

Bayol, and Thornton B. Goldsby; and sought to enjoin the defendant Bayol from sub-letting to his co-defendants, Aicardi & Tool, a certain storehouse in the city of Selma, which he had rented from said Goldsby, and which belonged jointly to said Goldsby and Elias Parkman. The storehouse in controversy formed part of a large block of stores, which Goldsby had erected on lots belonging to Parkman, under a contract by which it was agreed that they should be equally interested in the stores. At the death of Parkman, in October, 1853, the stores were not entirely finished, but were shortly afterwards completed by Goldsby, in accordance with the terms of his contract with Parkman. The entire first floor of the building was fitted up for storehouses, all of which were rented and used for that purpose; the rooms on the second floor being fitted up for lawyers' offices, sleeping apartments, &c., and being rented and occupied for those purposes. The corner store of the block was fitted up for a drug-store, and was rented to L. F. Bayne & Co., druggists, for the year ending on the 1st October, 1857, and was used by them as a drug-store. The bill alleged, that before the expiration of the tenancy of said L. F. Bayne & Co., Bayol, who was a member of that firm, applied to Goldsby for a renewal of their lease for another year; that Goldsby, supposing that they intended to use the premises as before, consented to the renewal of the lease; that Bayol made this application in his own name, at the instance of Aicardi & Tool, for the express purpose of re-letting the premises to them, to be used by them as a retail grocery for the sale of spirituous liquors, and because he knew that neither Goldsby nor the complainant would consent that the premises should be so used; and that the use of the premises by Aicardi & Tool, for the purpose specified, would be a nuisance to the neighborhood, would cause irreparable injury to the premises, would impair the value of the adjoining stores and offices, and would diminish the rents. It was further alleged in the bill, that the estate of Parkman had been declared insolvent; that Bayol was insolvent; and that Goldsby was absent from the State.

The chancellor dismissed the bill, on motion, for want of equity; and his decree is here assigned as error.

BYRD & MORGAN, for the appellant.—1. Conceding the principle, that a tenant has the right, under a general lease, to sub-let the premises to another, to be used for any ordinary purpose; yet, if Bayol combined with Aicardi & Tool to get a renewal of his lease for them, and procured such renewal by a fraudulent pretense or concealment of his purpose, this will vitiate the contract, if it appears that the concealed purpose for which the premises were to be used was in any degree injurious.—*Coffin v. Scott*, 7 Rob. (La.) 205; *Bonnett v. Sadler*, 14 Vesey, 526.

2. The injury to the premises, which would result from their conversion into a grocery for retailing spirituous liquors, is alleged to consist in these facts: that the house is fitted up for a drug-store, and it would require considerable expense to refit it after it had been used for the other purpose; that the value of the premises as a good stand for a drug-store would be impaired; that the value of the adjacent stores, and of the offices in the second story, as well as the annual rents, would be greatly lessened; and that a retail grocery, in such a place, would be a nuisance, and would cause irreparable injury to the property in the neighborhood. The court will judicially know that there are material differences between the business of keeping a drug-store and the business of keeping a retail grocery,—such differences that a house rented for one purpose cannot be used for the other.—*Nave v. Berry*, 22 Ala. 382; *McGhee v. Hill*, 1 Ala. 140.

3. The complainant had the right, and it was her duty, to see that no injury was done to the property by the act of her co-tenant or his lessee.—*Maddox v. White*, 4 Md. 72; 4 Sandf. Ch. 587; 1 Story's Equity, §§ 913-14.

GEO. W. GAYLE, *contra*.—1. When the lease does not restrict the use of the premises, the lessee has an implied right to use them for any legal purpose, or to sub-let them to another to be so used.—*Outlaw v. Cook*, Minor, 257;



Perry v. Hewlett, 5 Porter, 318; Seay v. Marks, 23 Ala. 532; Railroad Co. v. Burke, 27 Ala. 535; Harris v. Maury, 30 Ala. 679; 1 Bibb, 536; 14 Vesey, 526; 4 Sandf. Ch. 587. That retailing is lawful, see *Ex parte* Burnett, 30 Ala. 468.

2. The lease being for only one year, the bill cannot be maintained on the ground of irreparable injury.—1 Story's Equity, § 925; 16 Vesey, 342; Rosser v. Randolph, 7 Porter, 238; Lynes v. Ray, 10 Ala. 63.

3. The complainant, as the administrator of an insolvent estate, has no right to maintain the suit.—Patton v. Crow, 26 Ala. 432; Long v. McDougald, 23 Ala. 413; Chighizola v. LeBaron, 21 Ala. 402; Code, § 1751.

R. W. WALKER, J.—In the case of Nave v. Berry, 22 Ala. 390, this court said, in substance, that when the contract of lease is silent, the law implies an obligation on the part of the lessee of a house not to put it to a use materially different from that for which it was constructed, and to which it is adapted and has been usually appropriated. • It is an old principle of the common law, that a tenant is guilty of waste, if he materially changes the nature and character of the building leased. Thus, it is held, that he cannot convert a corn-mill into a fulling-mill, or a water-mill into a wind-mill, or a log-wood-mill into a cotton-mill, or a dwelling-house into a warehouse, or a brewhouse into an office.—Bridges v. Kilburn, 5 Vesey, 689; Kidd v. Dennison, 6 Barbour, 13; Jackson v. Andrews, 18 Johns. 433; 1 Eden's Inj. 186, and notes; Addison on Contr. 380; Shepard v. Briggs, 26 Vermont, 449. And many authorities, both English and American, declare that such changes will be deemed waste, even though the value of the property would be enhanced by the alteration.—Authorities *supra*; also, 11 Metc. 304.

A court of equity will restrain the lessee, or his sublessee, from making such material alterations as would change the nature of the building.—Douglass v. Wiggins, 1 Johns. Ch. 335; Bonnett v. Sadler, 14 Vesey, 526; 2 Story's Eq. § 913; Maddox v. White, 4 Md. 72.

In the view we take of this case, we need not inquire

whether the use of the room in question as a place for retailing spirituous liquors, and the changes in its internal arrangements necessary to prepare it for such use, would constitute such a material alteration of the nature of the building, such a wide departure from the use for which it was erected, and to which it has been usually appropriated, as would, of itself, justify the exercise of the preventive power of a court of chancery. We prefer to rest our decision upon other and much less doubtful grounds.

In the exercise of the inherent power which it possesses in cases of fraud, a court of chancery will interfere by injunction, to prevent a party from availing himself in any manner of a right or title arising out of a breach of contract, trust, or confidence.—*Prince Albert v. Strange*, 1 *McNaghten & Gordon*, 25, (cited in 3 *Chitty's Eq. Dig.* 2274, § 3;) *Norway v. Rowe*, 19 *Vesey*, 154.

It appears from the bill, that at the time Bayol rented the house from Goldsby, the relation of landlord and tenant existed between them; a relation which, in the estimation of a court of equity, so far partakes of a fiduciary character, that in all transactions between the parties in reference to the property, the utmost good faith is required. "If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and, as far as possible, restore the parties to their original rights."—1 *Story's Eq.* §§ 218, 323; *Willard's Eq.* 170, 189.

Bayol rented the house for the purpose of sub-letting it to Aicardi & Tool, to be used by them as an establishment for retailing spirituous liquors. He did not disclose to Goldsby the use to which he meant to appropriate the house, and must, under the circumstances, have known that Goldsby supposed it was to be occupied for the same purposes as under the former lease. It is further alleged, that Bayol well knew at the time he obtained the lease, that if the purpose for which the house was really rented should be disclosed to Goldsby, the contract would not be made; and it is shown that it was at the instance of

Aicardi & Tool that Bayol rented the house in his own name, and failed to make known to Goldsby the purposes for which it was wanted.

Assuming that the history of these transactions furnished by the bill is correct, whatever right Aicardi & Tool have acquired has been obtained by an abuse of confidence, and is the fruit of a fraudulent combination between themselves and Bayol, formed for the purpose of entrapping Goldsby into a bargain, which they knew he would not have made, if advised of the secret intentions of the parties. If they are permitted to assert and enjoy the right thus acquired, the result will be, that the value not only of this particular apartment, but of other rooms in the same tenement, for the special purposes for which they have been erected, prepared, and used, will be materially impaired. While it is undoubtedly true, that a *licensed* retail grocery has the express sanction of law, and therefore cannot be pronounced *per se* a nuisance; yet we cannot so far ignore matters universally known, as not to take notice of the fact, (of which there is indeed an express allegation in the bill,) that the occupation of a house for the purpose of retailing spirituous liquors has a tendency to render the adjoining rooms less desirable, and therefore less valuable as dry-goods and book-stores and lawyers' offices. It may be that the injury in the case would not be irreparable; nor, under the circumstances alleged, need it be. The equity of the bill rests, not upon the ground of nuisance or irreparable injury, but upon the inherent right of a court of chancery to prevent a party from asserting rights arising out of a violation of fiduciary duties, or procured by a fraudulent combination. Under the circumstances disclosed by this bill, we have no doubt of the right of Goldsby to an injunction restraining the parties from taking possession.—Bonnett v. Sadler, 14 Vesey, 526-7; Coffin v. Scott, 7 Robinson, 205; Att'y Gen'l v. Aspinall, 2 Myl. & Cr. 613, 625; Prince Albert v. Strange, *supra*; Norway v. Rowe, *supra*; O'Herlihy v. Hedges, 1 Sch. & Lefr. 123.

2. It remains to be considered, whether the complainant has such an interest in the subject-matter of this suit,



as gives her a title to relief. It was held before the Code, that the administrator of an insolvent estate cannot recover the possession of lands belonging to the estate by action at law.—Long v. McDougald, 23 Ala. 419; Patton v. Crow, 26 Ala. 412. This is now changed by statute.—Acts '57-8, p. 298. If the facts are as the complainant alleges, the estate represented by her had an undivided half-interest in this property, and a right to one half of the rents accruing before or after the death of the intestate. It is the duty of the administratrix to collect the share of the rents to which the estate is entitled, and to sell its undivided interest in the property. Whatever, therefore, would injure the value of the property, or lessen the rents, would diminish the assets of the estate. The bill shows, then, that the assets of the estate, which the complainant is to administer for the benefit of creditors, will be materially reduced, if the defendants are allowed to enjoy the right which they assert. This is an interest which a court of equity will recognize and protect.—2 Story's Eq. § 914.

3. While at law, all persons having a joint interest must join in the action as plaintiffs; in equity, the general rule is, that it is sufficient if all the parties interested in the subject of the suit are before the court, either as plaintiffs or defendants.—1 Dan. Ch. Pr. 273. If it be assumed that the present case is an exception to this rule, and that Goldsby should have been joined as a complainant, unless a sufficient excuse is shown for not doing so, we think that his absence from the State constitutes such excuse. See *Morse v. Hovey*, 9 Paige, 197.

The questions arising upon the demurrer were the only questions considered by the chancellor, and we have confined ourselves within the same limits. We think that the chancellor erred in sustaining the demurrer and dismissing the bill.

The decree is reversed, and the cause remanded.

## TOWN COUNCIL OF CAHABA vs. BURNETT.

[ACTION TO RECOVER MONEY PAID FOR LICENSE UNDER ILLEGAL MUNICIPAL ORDINANCE.]

1. *When action lies for money voluntarily paid under mistake.*—It is a settled principle of law in this State, that money voluntarily paid, through ignorance or mistake of law, with a full knowledge of all the facts, and without fraud or imposition, cannot be recovered by action.
2. *What constitutes voluntary payment.*—A payment of money to the clerk of the town council, as the price of a license for retailing spirituous liquors, under an ordinance afterwards declared void by the supreme court, cannot be considered to have been made upon compulsion, because the ordinance imposed a fine and imprisonment as the penalty for retailing without license; consequently, the money cannot be recovered by action.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by James T. Burnett, against the Town Council of Cahaba, to recover the sum of \$1000, alleged to be "due by account on the 1st March, 1855, the same being money paid said defendant unlawfully for a license for the year 1855." A demurrer to the complaint was interposed, but overruled. "On the trial," as the bill of exceptions states, "the plaintiff proved by one Lodor, who was clerk, secretary and treasurer of the town council of Cahaba on the 19th February, 1855, that the plaintiff applied to him at his office, his usual place of business, for a license to retail spirituous liquors in the town of Cahaba, from that time until the 15th January next thereafter, under 'the thousand-dollar ordinance,' as it was termed, and proposed to pay, and did pay him, nine hundred and five dollars for said license, being at the rate of one thousand dollars a year; that plaintiff did retail in said town, under said ordinance, for the time specified; that said money was put into the treasury, with the other money of the corporation, and was expended for the use and benefit of the town of Cahaba, under the direction of the town council; and that there remained in

said treasury, at the end of that year, a balance of about one hundred and seventy-five dollars, which he (witness) paid over to his successor in said office." The plaintiff then read in evidence the clerk's receipt for the money, and three ordinances of the town of Cahaba; the latter being in these words: "1st. To retail for one year spirituous or vinous liquors within the corporate limits of said town, one thousand dollars." "Ordinance 3: Be it further ordained, by the authority aforesaid, that any person or persons, retailing spirituous liquors, keeping a billiard-table for public use, or keeping a nine or ten-pin alley, or alley with any other number of pins, without having first obtained a license therefor, shall be liable to a fine of fifty dollars; which fine may be assessed for every day spirituous liquors may be retailed, or such billiard-table or nine or ten-pin alley may be used." "Ordinance 5: Be it further ordained, that if any person, for any violation of a town ordinance, shall be fined in any sum, and shall refuse or be unable to pay the same, such person may be committed to the common jail of Dallas county, for such time as the council may direct, not exceeding three days." This being all the evidence offered by the plaintiff, the defendant demurred to it, and the plaintiff joined in the demurrer. The court overruled the demurrer, and rendered judgment for the plaintiff; to which the defendant excepted, and which is now assigned as error.

ALEX. WHITE, J. D. F. WILLIAMS, and N. R. H. DAWSON, for the appellant.—The money sought to be recovered was voluntarily paid by the plaintiff, without any exaction or compulsion on the part of the defendant, with full knowledge of all the facts, but under a mistake as to his legal obligation to pay. According to all the authorities, ancient and modern, English and American, an action does not lie to recover money paid under such circumstances.—*Bilbie v. Lumley*, 2 East, 469; *Lowry v. Bourdieu*, Doug. 467; *Brisbane v. Dacres*, 5 Taunton, 155; *Skyring v. Greenwood*, 4 Barn. & Cress. 281; *Bramston v. Robins*, 4 Bingham, 11; *Wilson v. Ray*, 10 Ad. & El. 82; *Jones v. Watkins*, 1 Stew. 81; *Trustees of University*



v. Keller, 1 Ala. 406; Yarborough v. Wise, 5 Ala. 294; Rutherford v. McIvor, 21 Ala. 750; Gwynn v. Hamilton, 29 Ala. 238; Elliott v. Swartwout, 10 Peters, 150; 4 Metcalf, 181; 7 Cushing, 125; 9 Cowen, 674; 7 Hill, 159; 4 Denio, 308; 4 Gill, 425; 5 Gill, 244; 2 Rich. 317; 27 Maine, 145; 1 Ohio St. 268; 10 Ohio, 257; 15 Ohio, 625; 4 Pick. 114, 533; 2 Leigh, 76; 8 Yerger, 498; 1 Wendell, 355; 2 N. H. 341; 8 Barr, 109; 20 Penn. St. 421.

CHILTON & GUNTER, JNO. T. MORGAN, and GEO. W. GAYLE, *contra*.—The plaintiff was compelled, under the circumstances disclosed by the evidence, either to pay the money which is the subject of controversy, or to discontinue his business, or to subject himself to arrest, fine and imprisonment as for a criminal offense. A payment of money under such circumstances can, in no just sense of the term, be termed voluntary. No principle of law, or public policy, forbids its recovery; while, to deny a recovery, would be contrary to common right and justice, would allow a party to take advantage of his own wrong, where his adversary is not *in pari delicto*, and would hold out an encouragement to corporations in the exercise of illegal powers.—Neville v. Wilkinson, 1 Bro. C. C. 543; St. John v. St. John, 11 Vesey, 536; 3 Monroe, 82; Yarborough v. Wise, 5 Ala. 293; 1 Story's Equity, § 121; Moses v. McFarlane, 1 Bla. 219; Bingham v. Bingham, 1 Vesey, 126; Lansdowne v. Lansdowne, Mosely, 364; Brisbane v. Dacres, 5 Taunton, 150; 27 Maine, 147; 9 Pick. 128.

A. J. WALKER, C. J.—It is the law of this State, that where money has been *voluntarily* paid, through mistake or ignorance of law, with a full knowledge of the facts, and without fraud or imposition, it can not be reclaimed, either at law or in equity. While we are aware that this proposition is too broad to harmonize with all the decisions, yet it is supported by the great preponderance of adjudged cases, both in England and America, and by what we conceive to be a sound policy, and has been too often recognized in our jurisprudence to be now denied.

For these reasons, and because the subject has been recently examined with care in this court, we decline to enter upon a discussion of the subject.—Gwynn & Wife v. Hamilton, 29 Ala. 233; Rutherford v. McIvor, 21 Ala. 756; Knox v. Abercrombie, 11 Ala. 997.

That the payment of the money sought to be regained by this suit was made with a full knowledge of all the facts, in the absence of fraud or imposition, and on account of a mistake or ignorance of law, is clear, and is not controverted. The proposition with which this opinion commences, therefore, leaves the plaintiff no ground for his demand, if the payment was voluntary; and the fate of the case hangs upon the single question, whether, in the eye of the law, the payment was voluntary or compulsory.

Without being thereto directly called or requested, the plaintiff went to the proper officer of the town council, and paid to him the sum required by the ordinance to procure license to retail liquor in the town for the remainder of the year. The money was accepted, the license issued, and the defendant accordingly retailed liquor within the town. The ordinance fixing the price of the license has since been declared void. Other ordinances prescribed a liability to a fine of fifty dollars for every day upon which any person might retail without license, and to imprisonment, for a time not exceeding three days, if the fine was not paid. The payment of the price of the license was purely voluntary, unless the prospect of proceedings whereby he would be subjected to fine and imprisonment (if he failed to pay it) amounted to compulsion. There was no fraud, no confidential relation, no personal exaction. The ordinances do not appear to have been adopted otherwise than in the fullest confidence of their validity, and it is most probable that the plaintiff's proposal to pay the prescribed sum was under a conviction of legal duty. It does not affirmatively appear that the plaintiff was influenced by an apprehension of proceedings against him; but, if the presumption that he was can be indulged, it does not afford a sufficient predicate for the conclusion, that he acted under what the law deems compulsion.

That money has been paid under the apprehension of judicial proceedings, is no reason why there should be a reclamation.

If the influence of the mere apprehension of judicial proceedings is legal compulsion—if, when a party, having the alternative to pay or submit to a judicial investigation, elects the former, he can be said to act under a legal duress, then the distrust of the adequacy of the courts to protect and maintain the right is justified, and it is acknowledged that the perils of justice and right in the judicial tribunals are so great as to deprive one of his free volition, and shield him from responsibility. The law does not recognize its amenability to such a reproach. In consequence of the imperfection incident to all that is human, wrong may sometimes prevail in the purest and wisest judicial tribunals; yet, in theory, there is in our law a security for every right, and a redress for every wrong; and the practical operation of the law corresponds, in the main, with its profession. No one can be heard to say, that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully fined and imprisoned; and that being thereby deprived of his free will, he yielded to the wrong, and the courts must assist him to a reclamation.

Again: Another reason why a recovery should not be had in such a case is, that it would enable one, by paying a claim about to be asserted by suit, to fix his own time, within the statute of limitations, for the litigation. He might prefer to pay off the claim, and take the chance of his adversary's losing his testimony within the period of limitation from the time of payment; thus affording him an opportunity to regain the sum paid, when peradventure it might be made to appear, under the facts then extant, that the payment was not required by the law.

Furthermore, if the principles contended for were allowed, it would injuriously affect the party to whom the payment was made. Regarding the money as his own, he might be induced to adopt a style of living, or to dispense benefactions, not justified by his fortune. So far has this been carried in Pennsylvania, that a recovery of



taxes illegally assessed was denied, because the borough which received the payment had expended it in improvements.—Borough of Allentown v. Saeger, 20 Penn. State R. (9 Har.) 421. While we will not now endorse that case in its full extent, it illustrates the view which the courts take of the injustice involved in such suits; and it is the more appropriate here, because it was proved that most, if not all the money, had been expended by the corporation; and, it may be, in improvements, the benefits of which are shared by the plaintiff himself.

The authorities fully maintain the proposition, that the mere prospect of judicial proceedings, to enforce payment of a debt not legally due, does not make the payment compulsory. Where rent, not legally due, was paid in immediate prospect of a distress, the payment was held voluntary.—Knibbs v. Hall, 1 Esp. 84. So a payment of money made after action brought, with a declaration that it was without prejudice, and with intention to bring suit to recover it back, was held not compulsory.—Brown v. McKinnally, 1 Esp. 279. In a Massachusetts case, involving the question under consideration, the following lucid statement of the principle, with the reason for it, was made: "It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact, that the party so paying protests that he is not answerable, and gives a notice that he shall bring an action to recover the money back. *He has an opportunity in the first instance to contest the claim at law. He has, or may have, a day in court. He may plead and make proof that the claim on him is such as he is not bound to pay.*"—Benson v. Monroe, 7 Cush. 125. See, also, Preston v. Boston, 12 Pick. 13; Fleetwood v. City of N. Y., 2 Sandf. Sup. Ct. R. 475.

The supreme court of Ohio refused to sustain an action to recover money paid to procure a license in obedience to the exaction of a void ordinance of the city of Cincin-

nati, upon the ground that the payment was voluntary, notwithstanding the ordinance prescribed a fine as the penalty for its breach.—*Mays v. City of Cincinnati*, 1 Ohio St. R. 268. In the case of the *Sandwich Glass Co. v. Boston*, 4 Mete. 181, the doctrine is broadly stated, that a payment is voluntary, when made under a demand accompanied by no authority to enforce it except by suit at law. To the same effect are the decisions in *Clark v. Dutcher*, 9 Cow. 674, and *Sprague v. Birdsall*, 2 Cow. 419. See, also, *Silliman v. Wing*, 7 Hill, 159; *Abell v. Douglass*, 4 Denio, 305. In Maryland, there were an act of the legislature and ordinances of the city of Baltimore, passed in pursuance to it, (all of which were unconstitutional,) requiring persons owning certain lands to build walls around them, so far as they were bounded by Jones' Falls; and prescribing as a penalty for the failure to build such walls, that the city should have the same constructed, and issue warrants to the city collector for the collection of the costs of such construction from the owners of land so failing. An owner of land, under the constraint of these laws, built a wall, and sued to recover the cost from the city. The Maryland court of appeals held, that the action could not be maintained; that money paid under a misapprehension of one's legal rights and obligations could not be reclaimed, and that a payment made under an apprehension, or even menace, of an impending distress warrant, would not render it compulsory.—*Mayor of Baltimore v. Lefferman*, 4 Gill, 425; see, also, *Morris v. Mayor, &c., of Baltimore*, 5 Gill, 244; *Gordon v. Mayor of Baltimore*, 5 Gill, 231; *Smith v. Inhabitants of Readfield*, 27 Maine, 145; *Sheldon v. South School District, &c.*, 24 Cow. 88; *Town of Barkhanstead v. Care*, 5 Conn. 528; *N. Y. & Harlem Railroad Co. v. Marsh*, 2 Kernan, 308; *Christy v. City of St. Louis*, 20 Missouri, 143. Some of these cases go beyond the principles stated by us, and we do not now endorse them to their entire extent.

In South Carolina, a case kindred to this arose, in which an effort was made to recover back money, paid to procure a badge or license under a void ordinance of the city of Charleston; and the court sustained the principle

which we have laid down.—Robinson v. City Council of Charleston, 2 Richardson, 317.

There are a large number of cases—several of which are to be found in our own reports—in which it is held, that money paid upon an execution, issued on a judgment afterwards reversed, may be recovered back.—Paulling v. Watson, 26 Ala. 205; Ewing v. Peck, 26 Ala. 414; Williams v. Simmons, 22 Ala. 425; Simmons v. Price, 18 Ala. 405; Dupuy v. Roebuck, 7 Ala. 484; Knox v. Abercrombie, 11 Ala. 997; Stewart v. Conner, 9 Ala. 803; Duncan v. Ware, 5 St. & P. 119; Judson v. Eslava, Minor, 71; Stevens v. Fitch, 11 Metc. 248. Besides, this court, by its expressions in several of the cases, and by its decision in Abercrombie v. Knox, *supra*, is committed to the proposition, that money paid upon an erroneous judgment, afterwards reversed, may be recovered; and we have no inclination to assert a contrary doctrine.

There is another class of cases, in which payments of taxes illegally exacted have been held involuntary; but, in all those cases, the tax collector had statutory authority to make a levy, or a warrant vesting him with such authority. Although the decisions are by no means uniform in maintaining that money paid under such circumstances may be reclaimed, yet this court has so decided, and we think the decision correct.—Wiley v. Parmer, 14 Ala. 627; Crutchfield v. Wood, 16 Ala. 702; Jayner v. Third Sch. Dist. in Egremont, 3 Cush. 567–572; Preston v. Boston, *supra*; Amesbury W. & C. Man. Co. v. Inhab. of Amesbury, 17 Mass. 461; Sheldon v. South Sch. Dist., *supra*; Town of Barkhamstead v. Case, *supra*; N. Y. & Har. R. R. Co. v. Marsh, *supra*; Christy v. City of St. Louis, *supra*; Smith v. In. of Readfield, *supra*.

These cases, in which money paid upon an erroneous judgment, or upon an execution issued upon such a judgment, or in discharge of a void assessment of taxes, was held recoverable, are distinguishable from this; because there was an apparent subsisting means of enforcing the illegal demand, without a resort to judicial proceedings, and without giving the party a day in court; and this is the distinction made in Benson v. Monroe, 7 Cush. 125.



It is also conceded, that a payment is involuntary when made for the purpose of regaining one's liberty, or the possession of his property.—Maxwell v. Griswold, 10 How. 242–256; Elliot v. Swartwout, 10 Pet. 137–156; Allston v. Durant, 2 Strob. 257; Cadaval v. Collins, 4 Ad. & El. 858; Atlee v. Backhouse, 3 M. & W. 645; Oates v. Hudson, 5 L. & E. 469; Ripley v. Gelston, 9 Johns. 201; Clinton v. Strong, *ib.* 369; Chase v. Dwinal, 7 Greenleaf, 134. There is no element in the case before us, which brings it within this principle. Another principle, closely analogous to it, is, that if money be extorted as a condition upon which an officer will grant a license, the clearance of a vessel, or the like, when the party is legally entitled to it, the payment is involuntary.—Morgan v. Parmer, 2 B. & C. 733; Ripley v. Gelston, and Elliot v. Swartwout, *supra*. The plaintiff can not invoke that principle, because if it be conceded that he was entitled to have license issued from the corporation, the money was not extorted from him as the only agency by which he could obtain the license, but of his own volition he went forward and proposed the payment. He who received the payment was merely passive: he made no demand, no exaction. The distinction is between the cases where a party, acting from his own volition, makes a payment, upon the suggestion of his own mind that it is legal, to an officer who accepts it because he also deems it legal; and where a party demands that which is due to him from the officer, and the latter exacts the payment as the only condition upon which he can obtain that which is legally due from that officer. In the former case, the payment is voluntary; in the latter, involuntary. This distinction is taken and sustained in several of the cases above cited.—Robinson v. City of Charleston, 2 Richardson, 317; Sprague v. Birdsall, 2 Cow. 419; Maxwell v. Griswold, 10 How. 256; Elliot v. Swartwout, 10 Peters, 157; Atlee v. Backhouse, 3 M. & W. 632; Amesbury Woollen & Cotton Man. Co. v. Inhabitants of Amesbury, 17 Mass. 461.

Upon the last point above stated in this opinion my brethren express no opinion. They think there is no

necessity for deciding that point, and that the decision of the other points is conclusive as to whether the payment was voluntary. I think differently. I understand the plaintiff to plant himself upon the proposition that the payment was involuntary, for two reasons: 1st, because of the liability to fine and imprisonment in the event of his not paying; and, 2d, because the payment was made to procure a license to which he was entitled without such payment. In my opinion, we are not authorized to affirm that there was error in the overruling of the demurrer to evidence, unless we can decide both these propositions against the plaintiff.

The court is unanimous in the conclusion, that upon the facts, the plaintiff had no right of action whatever, and the court erred in adjudging the demurrer to evidence in his favor.

Judgment reversed, and cause remanded.

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## YOU vs. FLINN.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Statute of uses and trusts construed.*—Section 1306 of the Code converts all titles and interests in lands into legal estates in the beneficiary, to the same extent as if the conveyance had been made directly to him, where the nominal title is vested in a naked trustee, who is not placed in possession, nor required to perform any duties, and where the instrument creating such nominal title declares a use, trust, or confidence for another; but it has no application to a conveyance, which, although it may declare a trust for the use of the grantor or of another person, charges the trustee with the control, management, or other active duties in regard to the trust property; nor does it apply to a conveyance of land, taken by a father in the name of his son, which recites that the purchase-money was paid by the father.
2. *When purchaser at sheriff's sale may maintain real action.*—A purchaser of land at sheriff's sale does not obtain such a title as will support a real action in the nature of an ejectment, when it appears that the defendant in execution, although he had himself paid the purchase-money, took the conveyance in the name of his son.

APPEAL from the Circuit Court of Dale.

Tried before the Hon. ROBT. DOUGHERTY.

THIS action was brought by Benjamin You, against James Flinn, to recover the possession of certain lots in the town of Newton in said county, together with damages for their detention ; and was commenced on the 15th February, 1858. The plaintiff claimed the lots under a purchase at sheriff's sale against James J. Flinn, who was the father of the defendant. On the trial, the plaintiff offered in evidence the judgment under which the land was sold, and the sheriff's deed to himself as the highest bidder ; and proved, that the action in which said judgment was rendered was commenced by attachment, which was levied on the 1st July, 1856 ; and that the sheriff's sale, at which he became purchaser, was made on the 1st Monday in June, 1857. "The plaintiff then offered in evidence a deed for the land in controversy from one A. J. Biggers to the defendant, which was dated the 5th February, 1856, and which recited that the purchase-money for said land was paid by said James J. Flinn, the father of said defendant ; and proved by said Bigger that said purchase-money was in fact paid by said James J. Flinn, and that the deed was made to the defendant by the direction and request of said James J. ; also, that said James J. was greatly embarrassed with debt at the time of the execution of said deed ; that both he and his son, the defendant, resided on the land during a part of the year 1856 ; and that said James J., during that year, left the country for parts unknown. This being all the evidence in the case, the court charged the jury, that if they believed the evidence, they must find for the defendant." In consequence of this charge, to which the plaintiff excepted, he was compelled to take a nonsuit ; which he now moves to set aside, and assigns as error the charge of the court.

PUGH & BULLOCK, for the appellant.

L. L. CATO, *contra*.



STONE, J.—A construction of the following sections of the Code seems necessary to a proper decision of this case :

“§ 1306. No use, trust or confidence, can be declared of any land, or of any charge upon the same, for the mere benefit of third persons ; and all assurances, declaring any such use, trust or confidence, must be held and taken to vest the legal estate in the person or persons for whom the same is declared, and no estate or interest can vest thereby in any trustee.

“§ 1307. Nothing in the preceding section contained shall prevent the conveyance of real or personal property, or the issues, rents and profits thereof, to another, in trust for the use of the grantor, or of a third person, or his family, or for any other lawful purpose ; but in such case, the legal title vests in the trustee.”

Conveyances coming within the influence of section 1306, vest the legal title in the beneficiary, while the trustee takes no interest or title whatever. In cases governed by section 1307, the trustee takes the legal title, while the beneficiary has but an equity. It is manifest, then, that the two sections must each have an independent and separate field of operation.

While we must confess that the dividing line between the two sections is not so clearly defined as could be desired, we, nevertheless, think that the varying phraseology affords a sufficient guide to a proper and satisfactory solution. It will be observed, that section 1306 provides for an use, trust or confidence, for the *mere* benefit of third persons ; while section 1307 contemplates conveyances *in trust for the use* of the grantor, &c. We suppose the two sections were derived from the Revised Statutes of New York, which contain provisions of kindred import, but not in the same language. The legislation of each State was doubtless conceived in the commendable design of simplifying conveyances, titles, &c., and of disrobing them, to a considerable extent, of the machinery of uses and trusts, too often resorted to as a cover for fraud, and grievously detrimental to that free commerce in property which is a cardinal principle in our policy.

The legislation of New York, which, it is supposed, suggested the incorporation into our Code of the sections above copied, is found in part 2, ch. 1, title 2, article 2, of their Revised Statutes, commencing on page 727. Its first section provides, that "uses and trusts, except as authorized and modified in this article, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this chapter."—§ 45.

Section 47 declares, that every person who shall be entitled to the actual possession of lands, and the receipt of the rents and profits, shall be deemed to have a legal estate therein.

Section 48 provides, that section 47 shall not divest the estate of any trustee in any existing trust, whose title is not merely nominal, but is connected with some power of disposition or management of the lands.

Section 49 requires conveyances to be made directly to the person who is to enjoy the possession and profits, and abolishes mere naked trusts.

Section 50 declares, that section 49 shall not destroy trusts arising or resulting by implication of law, or such express trusts as are afterwards provided for.

Sections 51, 52 and 53 abolish, as between trustee and beneficiary, all trusts which shall result by operation of law from the payment of the purchase-money by one, where the title is made to another; declare such conveyances fraudulent and void, as against the creditors of the person by whom the purchase-money is paid; but the trust is not inoperative *inter partes*, if the conveyance is procured to be made to the trustee, without the consent or knowledge of the person paying the consideration.

"§ 55. Express trusts may be created for any or either of the following purposes:

"1. To sell lands for the benefit of creditors;

"2. To sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon;

"3. To secure the rents and profits of lands, and apply them to the education and support, or either, of any per-

son, during the life of such person, or for any shorter time, subject to the rules prescribed in the first article of this title;

“4. To receive the rents and profits of lands, and to accumulate the same, for the purposes, and within the limits prescribed in the first article of this title.”

The New York statutes, a synopsis of which is given above, have been very thoroughly and ably considered in that State. In the great case of *Coster v. Lorillard*, 14 Wend. 265–399, they underwent a very full consideration in the New York court for the correction of errors. Opinions were delivered, *seriatim*, by Chief-Justice Savage, Justice Nelson, and three of the senators. There was no substantial difference expressed, on the general effect of their statutes. All seemed to agree in the construction of sections 45, 46, 47, 49, the substance of which sections is given above. All seemed to agree that, under their statutes, uses and trusts were converted into legal estates, except to the extent of the reservations therein contained. Their chief divisions of opinion were upon the construction of section 55, subdivision 3. As the peculiar terms of that provision are not found in our statutes, we need not notice their discussion further.

In the late case of *Gott v. Cook*, 7 Paige, 521, Chancellor Walworth also considered their legislation on this subject, and particularly subdivision 3 of section 55.

Chancellor Kent has also sketched, in clear and comprehensive language, an exposition of their statutes now under discussion.—See 4 Kent's Com. (8th ed.) pp. 323, *et seq.* (m. p.) 308.

The substance of all that has been there written is, that their statutes have abolished all dry or useless express trusts; that implied trusts are preserved, only to the extent necessary to prevent fraud; and that express trusts are permitted, in cases where the positive services of a trustee are required to carry out the active duties enumerated in their statutes.

A comparison of our statutes with those of New York will satisfy any one, that the object aimed at by our legislature is, in the main, the same as that which had been



achieved by theirs; namely, the conversion of dry or naked trusts and uses into legal statutes. Our statutes are not as comprehensive as theirs. There seems to be no provision in ours corresponding with section 51 of theirs. We think, however, that the effect of our section 1306 is to accomplish the chief results of their sections 45, 47 and 49; while our section 1307 was intended to subserve all the beneficial purposes of their sections 48 and 55. The effect of our section 1320 is to continue trusts which result by implication or construction of law, and those which may be transferred or extinguished by operation of law.

Without further pointing out the particulars in which our statutes are less comprehensive than those of New York, we do not hesitate to declare, that section 1306 of the Code converts into legal estates in the beneficiary all titles and interests in lands, where the nominal title is vested in a naked or dry trustee—one who is not placed in possession, and who is required to perform no duties—and where the instrument creating such nominal title *declares* a use, trust or confidence for another, to the same extent as if the deed or conveyance had been made directly to the beneficiary. On the other hand, it has no application to conveyances of either real or personal property, although the conveyance may declare that it is in trust for the use of the grantor or another; provided the trustee is charged with the control, management, or other active duties in regard to the trust fund. This latter class falls under section 1307 of the Code.

The deed of Mr. Biggers, given in evidence, was made to James Flinn, the defendant in this suit. It does not, so far as we are informed, *declare* any use, trust or confidence for another. True, it expresses that the purchase-money was paid by James J. Flinn; and this testimony, if uncontroverted, is enough to establish a resulting trust in favor of James J., by whom the money purports to have been paid.—See 2 Story's Eq. §§ 1201–2; *Hatton v. Landman*, 28 Ala. 127; *Deg v. Deg*, 2 Pr. Williams, 412, 414; *Ryall v. Ryall*, 1 Atk. 59; *Young v. Peachy*, 2 Atk. 254. This presumption, however, might in some

cases be rebutted ; and it might be shown that the money was really the property of James Flinn, or, under some lawful arrangement, the title was rightly taken in the name of the father.—See *Hatton v. Landman*, *supra* ; also, *Smith's Ex'r v. Garth*, 32 Ala. We do not think this case comes within section 1306 of the Code.

[2.] It is contended, however, that the plaintiff should have been permitted to recover in the action of ejectment, because the proof showed that James J. Flinn was the owner of the lots—had a perfect equity, having paid the purchase-money,—and that plaintiff had purchased his interest at sheriff's sale. Under section 2455 of the Code, a perfect equity is liable to levy and sale under execution.

Whether the right or claim of James J. Flinn to the lots in controversy is a perfect equity within section 2455 of the Code, it is not necessary in this case that we should decide. The question has not been fully argued, and we deem it more prudent not to express an opinion.—See *Shields v. Lyon*, Min. 278 ; *Gillespie v. Sommerville*, 3 S. & P. 447 ; *Lewis v. Moorman*, 7 Por. 522 ; *Edmundson v. Montague*, 14 Ala. 371 ; *Crabb v. Pratt*, 15 Ala. 843.

A purchaser at a sheriff's sale acquires only the title and interest of the defendant in execution.—See authorities in *Shep. Dig.* 635, §§ 76, 77, 78, 86 ; also, *Elmore v. Harris*, 13 Ala. 360 ; *McKinney v. McKinney*, 5 Ala. 719 ; *Land v. Hopkins*, 7 Ala. 115 ; *Lang v. Waring*, 17 Ala. 145 ; *Wilson v. Beard*, 19 Ala. 629. The most that can be affirmed of James J. Flinn's title is, that it was a perfect equity, and, therefore, only an equitable title. The plaintiff, You, if he acquired all the title which James J. Flinn had owned, had still but an equitable title. This, under our system, will not support an ejectment.—See Code, § 2129 ; *Trammell v. Simmons*, 17 Ala. 411 ; *Sellers v. Hayes*, 17 Ala. 749 ; *Seabury v. Stewart*, 22 Ala. 207 ; *Cook v. Webb*, 18 Ala. 810. See, also, *West v. Foreman*, 21 Ala. 400 ; *Savage v. Walsh*, 26 Ala. 619 ; *Jackson v. Morse*, 16 Johns. 196 ; *Williams v. Hartshorn*, 30 Ala. 211.

We are aware that, in New York, a different rule as to

the sale of resulting trusts under executions at law, is said to prevail.—*Jackson v. Leggett*, 7 Wend. 377; *Jackson v. Lorm*, 4 Cow. 599; *Foote v. Colvin*, 3 Johns. 216. Such is not the law of Alabama.

Judgment of the circuit court affirmed.

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### KING vs. PARMER.

[TROVER FOR CONVERSION OF OX.]

1. *Nonsuit on verdict for plaintiff for less than \$50.*—Section 2365 of the Code, which requires the plaintiff to be nonsuited, on a verdict in his favor for an amount less than that of which the court has jurisdiction, unless he makes the affidavit prescribed by that section, applies only to actions *ex contractu*, and does not include an action of trover. (A. J. WALKER, C. J., *dissenting*.)

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by William Parmer, against John King, to recover damages for the conversion of an ox, alleged to be of the value of one hundred dollars. The jury returned a verdict for the plaintiff, and assessed his damages at thirty-nine 50-100 dollars; and the court thereupon rendered judgment in his favor for that amount. On a subsequent day of the term, the defendant moved the court to set aside this judgment, and to dismiss the suit, because the amount recovered by the plaintiff was less than that of which the court had jurisdiction. No affidavit was submitted by the plaintiff, as required by the statute; nor was the amount of his recovery reduced by a successful plea of set-off. The court overruled the motion, and refused to dismiss the suit; to which ruling the defendant excepted, and which he now assigns as error.

R. M. WILLIAMSON, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.



R. W. WALKER, J.—Section 2365 of the Code is in the following words: “If suit be brought on any moneyed demand, for a less amount than that of which the court has jurisdiction, the suit must be dismissed; or, if suit be brought for such amount, and a less sum be recovered, unless the amount is reduced below that of which the court has jurisdiction, by a set-off successfully made by the defendant, the judgment must be set aside, and the suit dismissed, unless he, or some one for him, make affidavit, which must be filed in the cause, that the amount sued for is actually due, and that a recovery for the true amount was prevented by failure of proof, the interposition of the statute of limitations, or some other sufficient cause, to be judged of by the court; and in that event, he must have judgment for the reduced sum.”

The majority of the court are of opinion, that a demand which is sought to be enforced by an action of trover, is not a ‘moneyed demand,’ within the meaning of this section. They think, that it plainly appears from the context of which this term, ‘moneyed demand,’ forms a part, that as *here employed*, it embraces only those demands which arise out of contracts, express or implied, for the payment of money, and which, from their nature, enable the plaintiff to make affidavit that the *amount* sued for is *actually due*,” and that “a recovery for the *true* amount was prevented by a failure of proof,” &c. The section, therefore, applies only to actions *ex contractu*, and not to actions *ex delicto*.

Judgment affirmed.

A. J. WALKER, C. J.—Viewing section 2365, in connection with sections 628, 711, and 2503, I think, that the term “*moneyed demand*,” as it occurs in that section, includes a demand recoverable in trover; and I therefore dissent from the opinion of the majority of the court.

## SHACKELFORD vs. BULLOCK.

[BILL IN EQUITY FOR REFORMATION OF ANTE-NUPTIAL CONTRACT.]

1. *Deed of marriage-settlement construed, as to meaning of "heirs of the body," and "natural heirs."*—Where a deed of marriage-settlement, by which the wife's property, real and personal, was conveyed to a trustee for her sole and separate use, contained the further provisions, that if the wife survived her husband, and then died leaving heirs of her body, "the said property shall vest absolutely in such heirs of her body;" and that if the wife died before her husband, "leaving no heirs of her body, then, and in that case, the said property shall vest in and belong to her natural heirs, discharged of all trusts,"—held, that heirs of the body meant children; that the contingent remainder to the natural heirs of the wife was not too remote; and that the rule in Shelley's case did not apply, because the wife's estate was equitable, while that of her heirs was legal.
2. *Laches.*—Equity will not impute laches to a party, on account of his failure to institute judicial proceedings, until it is possible for him to institute a suit in which a decree might be rendered concluding the parties interested adversely to him; as where he seeks the reformation of a deed, and the only parties adversely interested cannot be ascertained until the death of a person having a prior life estate.
3. *Parties to bill for reformation of deed.*—To a bill filed by the husband, asking the reformation of a deed of marriage-settlement, on the ground of fraud or mistake, in the insertion of a provision giving a contingent remainder, on the death of the wife leaving no children, to her "natural heirs," instead of the husband,—the "natural heirs" of the wife, who cannot be ascertained until her death, are necessary parties; and their interests cannot be represented by any other parties.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by John Shackelford, against the heirs-at-law of his deceased wife, whose maiden name was Maria L. Turner; and sought the reformation of an ante-nuptial contract executed by the complainant and his said wife, so as to make it provide that, on the death of the wife leaving no children, the property conveyed should go to the complainant, instead of the heirs of the wife. The complainant and his said wife were married, in this State, on the 25th January, 1842; his wife died on the 3d February, 1855; and the bill was filed on the 19th October, 1855.

The bill alleged, that the complainant and his said wife, prior to their marriage, agreed to execute a marriage-settlement of all the property then owned by the wife, which consisted of lands, slaves, money, and choses in action; and that the terms of this contract were agreed on, and were reduced to writing, but the writing was never signed by the parties. The writing referred to, which is made an exhibit to the bill, conveyed the property to Green Wood, as trustee, on the following trusts, limitations and conditions: "In special trust and confidence for the sole use and maintenance of the said Maria L. Turner, and the child or children that may be born of her body under the marriage aforesaid; the said Maria to take and keep possession of the said property, and to enjoy the free use of the same in every respect whatsoever; and the said property not to be liable for any debt or debts of the said John Shackelford, now contracted, or that may be hereafter contracted by him; the said trustee not to be held liable for any of the hire or profits of the said property. And in the event that the said John Shackelford should die, leaving the said Maria L. Turner surviving, with issue, then, and in that case, the said property is to vest in the said Maria L. Turner and the child or children of her body; but, should the said Maria L. Turner die first, leaving issue, then, and in that case, the said property is to go to the surviving child or children of the said Maria L. Turner; and should there be no children by the marriage, then, and in that event, if the said John Shackelford should die first, the said property is to belong to the said Maria L. Turner in her own right; *and if the said Maria L. Turner should die before the said John Shackelford, then the said property, there being no issue from the marriage, is to vest solely in the said John Shackelford.*"

The bill further alleged, that when this writing, which truly expressed the original agreement of the parties, was read over to them in the presence of their friends, it was agreed that Julius C. Turner, who was a brother of said Maria L. Turner, should be substituted as trustee instead of Wood, and that the deed should be so changed that,



“in the event of the death of said John Shackelford, leaving the said Maria L. surviving with issue, the said Maria L. should have the control of during life, or a life estate in the whole property ;” that James A. Bullock, who had married a sister of said Maria L. Turner, and who was present on the occasion referred to, then took the writing, and promised to have another instrument drawn, which should contain the alterations above mentioned, and the parties consented that he should do so ; that said Bullock procured an attorney to draw up another deed, in which he fraudulently had inserted, instead of the last provision in the original deed, a limitation in favor of the “natural heirs” of the said Maria L. Turner, in the event of her death without children before her husband ; that this deed was never seen by the parties, until the marriage ceremony was about being performed, and was then executed by them, without reading it, under the belief that it contained only the provisions to which they had agreed ; that the mistake in the deed was discovered by the complainant a few weeks after his marriage, and was communicated by him to his wife, whose brothers and sisters then agreed that another deed should be executed, truly expressing the contract between the parties ; that the execution of this deed was delayed, from time to time, until the death of some of the parties prevented its consummation ; that afterwards, in 1852, complainant consulted with his attorneys, with the view of filing a bill for the reformation of the deed, and was informed by them that it was unnecessary, inasmuch as his wife, there being no issue of the marriage, had a right to dispose of the property by will ; that his wife promised to make a will in his favor, but died intestate, leaving no children ; and that he did not discover, until after the death of his wife, that the mistake in the deed was the result of premeditated fraud on the part of Bullock.

By the deed actually executed by the parties, a copy of which is made an exhibit to the bill, the property is conveyed to Julius C. Turner, as trustee, “upon the following conditions and limitations: That the said Maria L. Turner shall be permitted and allowed to have the sole

and separate control of said property, and that the same shall not be liable or subject to the debts, contracts or engagements of her said husband, either now made, or hereafter to be made, nor the rents, profits or hire thereof, to be subject to his debts as aforesaid; but the said trustee is not to be liable for said rents, profits or hire, unless he should take the said property into his possession and control. And it is further provided and agreed, that should the said Maria L. die before her said intended husband, leaving heirs of her body, the said property shall vest in and belong to said heirs absolutely, discharged of the said trust; and should the said John Shackelford die before his intended wife, as aforesaid, the said trustee shall hold the said property for the use of said Maria L. and the heirs of her body, if such there should be, and, upon the death of said Maria L., the said property shall vest absolutely, as aforesaid, in such heirs of her body as may be living at her death; *and should there, at the death of the said Maria L., be no heir or heirs of her body, then to vest absolutely, discharged of all trusts, in her natural heirs.* And the said Julius C. Turner is hereby authorized and empowered, whenever it shall be conducive to the interest of the said Maria L., by and with her consent, to be manifested by her joining in the conveyance, to sell and dispose of all or any of the property hereby conveyed, and to re-invest the proceeds of such sales in other property, to be held upon the like trusts and conditions as before expressed. And it is further expressly agreed and understood, *that should the said Maria L. die before her intended husband, leaving no heirs of her body, then, and in that case, the property above conveyed shall vest in and belong to her natural heirs, discharged of all trusts.*"

The chancellor dismissed the bill; on motion, for want of equity, on the ground that the plaintiff's claim to relief was barred by his laches and the staleness of his demand; and his decree is here assigned as error.

WM. P. CHILTON, WATTS, JUDGE & JACKSON, and ELMORE & YANCEY, for the appellant.—1. The legal bar of the statute of limitations, and the analogous rule which

obtains in equity respecting state demands, are alike intended to protect adverse possessors against outstanding claims, and have no application in this case. Here, there never was an adverse possession: the complainant himself held the uninterrupted possession of the property; his wife acquiesced in the claim which he now asserts, and the other parties in interest<sup>z</sup> promised to rectify the alleged mistake. In such case, neither the legal bar of the statute, nor the equitable rule respecting stale demands, presents any obstacle to the relief sought. *Shearman v. Irvine's Lessee*, 4 Cranch, 367; *Kirk v. Smith*, 9 Wheat. 241; *Alexander v. Pendleton*, 8 Cranch, 462; *Base v. Gray*, 4 Wheat. 214; *Richard v. Williams*, 7 Wheaton, 59; *McClung v. Ross*, 5 Wheaton, 116; *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289; *Abercrombie v. Baldwin*, 15 Ala. 363; *Herbert v. Hanrick*, 16 Ala. 581; *Boyd v. Beck*, 29 Ala. 703; *Crofton v. Ormsby*, 2 Sch. & Lef. 603; *Miller v. Bear*, 3 Paige, 466; *Prevost v. Gratz*, 6 Wheaton, 481; *Barbour v. Whitlock*, 4 Monroe, 181; 2 J. J. Mar. 179; 1 Wash. C. C. 18; 3 Bro. C. C. 639.

2. Equity will not impute laches to a party, on account of his failure to resort to judicial proceedings, until he has a right to sue, and until there is some one *in esse* whom he may sue. The complainant in this case had no vested right until the death of his wife, and there was no one in being whom he could sue, as having an adversary interest. If the wife had resisted, instead of admitting the justice of his demand, and he had brought suit against her, the parties now claiming under the ulterior limitation to her "natural heirs," being neither parties nor privies, would not have been bound by the decree. The rule invoked by the appellees, which allows the holder of a prior estate to represent those having an ulterior interest, applies only to cases in which the ulterior limitations are dependent on the prior right of the party before the court, who, therefore, represents the whole estate.—*Calvert on Parties*, 50; *Adams' Equity*, 315; *Allen v. Allen*, 4 Irish Eq. R. 472; *Mitford's Eq. Pl.* 173-4; *Lloyd v.*



Johnes, 9 Vesey, 39; Gaskell v. Gaskell, 6 Sim. 643; 2 Y. & Col. 597.

D. W. BAINE, with whom were D. CLOPTON, and MARTIN, BALDWIN & SAYRE, *contra*.—1. Under the original marriage-settlement, alleged to have been reduced to writing but never signed by the parties, the complainant took a contingent remainder in the property. Such an interest is deemed valuable in law, and is the subject of alienation and transfer before the contingency happens. Fearne on Remainders, 363; Keyes on Chattels, 306. Of this interest the complainant has been deprived by the alleged fraud of Bullock. This fraud, then, worked a present injury, for which a cause of action then accrued; and the statute of limitations then began to run, although the damage consequent on the fraud had not been ascertained.—Wilcox v. Plummer, 4 Peters, 172; Utica Bank v. Childs, 6 Cowen's Rep. 238; Governor v. Gordon, 15 Ala. 78; 7 Ala. 187; 16 Ala. 787; 3 Term Rep. 56. In the absence of an averment to the contrary, the law presumes that the possession of the property in the mean time has been with the title; that is, with the trustee, for the separate use of Mrs. Shackelford, during her life, and with the defendants since her death.—Cole v. Varner, 31 Ala. 244; 17 Ala. 573; 15 Ala. 671; 2 Swan, 480.

2. It is said, that no decree could have been rendered during the life of Mrs. Shackelford, which would have bound the present defendants, because they were not *in esse*, and could not have been made parties. If this position be correct, it presents the anomalous case of a man having an undoubted present right, the remedy for which is postponed until the happening of an event which destroys the right itself; in other words, the law admits the complainant's right, but denies him any remedy for an injury to it until the right itself has become worthless. In behalf of this position the general rule is invoked, that all persons materially interested in the suit, or in the subject of it, ought to be made parties. But this general rule is "not founded on any positive or uniform principle"; "is open to exceptions, qualifications, and limita-

tions," all of which are declared to be governed by the principle, "that as the object of the general rule is to accomplish the purposes of justice," "and is founded in some sort upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons, or if the circumstances of the case render the application of the rule wholly impracticable."—Sto. Eq. Pl. §§ 76 c, 77, 135 a. If, then, the application of this general rule be discretionary with the court, what stronger case can be presented for the exercise of that discretion than the one now before the court? The rule which allows and requires representation of parties, grew out of the necessities of cases in which there would be a complete failure of the complainant's remedy, because parties who were interested were not *in esse*, unless he was allowed to bind them by proceeding against parties who had prior estates. The doctrine of representation exists in every case, where the preservation of a right renders it necessary to proceed in equity against contingent remainder-men not *in esse*; and the doctrine is peculiarly applicable to the case at bar.—Gifford v. Hart, 1 Sch. & Lef. 408; Cockburn v. Thompson, 16 Vesey, 325; Fletcher v. Tollett, 5 Vesey, 14, note; Calvert on Parties, 49, 52–3, note; Baylor v. DeJarnette, 13 Grattan, 166; Hildreth v. Elliott, 8 Pick. 293; Bradley v. Piexoto, 3 Vesey, 324; Sohier v. Williams, 1 Curtis, 479; 1 Dan. Ch. Pr. 374; Mitford's Eq. Pl. 173; Story's Equity Pl. § 145.

A. J. WALKER, C. J.—The chancellor having dismissed the complainant's bill for want of equity, its allegations are to be taken as true. We shall, therefore, in this opinion, speak of and treat them as facts.

The complainant, John Shackelford, and Maria L. Turner, were married on the 25th January, 1842. The terms of a contract were agreed upon between them before the marriage, and were committed to writing. They, as

far as it is necessary to notice them in this opinion, were to the effect following: *The property of Maria L. Turner was conveyed to a trustee, to have and hold in trust for her and the child or children of the contemplated marriage. If Maria L. Turner should survive her intended husband, having issue, then, and in that event, the property was to vest in her and her children. If Shackelford should survive his intended wife, then the property was to go to her child or children. If there were no children of the marriage, the property was to go to Maria L. Turner, if she survived her husband; and if there were no children of the marriage, the property was to go to Shackelford, if he survived his wife. After the reduction of the terms of the agreement to writing, an alteration was agreed upon, to the effect following: That a different person should be the trustee, and that in the event of Maria L. Turner's surviving her intended husband, having issue, she should have the control of, during her life, or a life estate in, the whole property.*

A person present when the alteration was assented to, agreed to procure the writing of a contract containing the terms of the agreement as altered. That person fraudulently procured a contract to be written, varying in its provisions from the agreement, and presented it for execution, as the parties were about to enter upon the performance of the marriage ceremony. The written contract was then executed, without reading it, under the belief by the parties that it corresponded with the previous agreement. The only variation of the written contract from the agreement of the parties, necessary to be here noticed, is made by the last clause, which is in the words following, to-wit: "*Should the said Maria L. die before her intended husband, leaving no heirs of her body, then, and in that case, the property above conveyed shall vest in and belong to her natural heirs, discharged of all trusts.*"

The phrase, "heirs of the body," in this clause, qualified by the context, clearly means children.—*McVay v. Ijams*, 27 Ala. 238; *Isbell v. Maclin*, 24 Ala. 315. The clause may, therefore, be read thus: "Should the said Maria L. die before her intended husband, leaving no children, then, and in that case, the property above conveyed



shall vest in and belong to her natural heirs, discharged of all trusts." The estate vested in Maria L. Turner by the marriage-settlement was a trust estate; and the trust could not be regarded as converted into a legal estate, because the duties imposed upon the trustee are such as render it necessary to preserve and keep open the trust. Hill on Trustees, 232, 233, 234. The written contract directs that, in the designated contingencies, the heirs shall take the property "discharged of all trusts." The heirs take, therefore, if they take at all, a legal estate. The ancestor's estate being equitable, and the estate to the heirs legal; or, in other words, the two estates being of different quality, the rule in Shelley's case does not apply, and the word *heirs* is a word of purchase.—1 Fearne on Rem. 51; Keyes on Realty, 39, § 71. The limitation over to the "natural heirs" is not too remote.—Isbell v. Maclin, 24 Ala. 315, and authorities therein referred to.

Under the executed settlement, those persons who might be the collateral heirs of Mrs. Shackelford at her death, took a contingent remainder. The contingency upon which the remainder depended, under the clause above copied, was the death of Mrs. Shackelford without children, in the life-time of her husband. In the very same contingency, the property would have gone to Shackelford, under the agreement fixing the terms of the settlement. The contingency has now happened; and the conflict between the right of Shackelford under the contract actually made, and the right of the heirs under the written settlement fraudulently imposed upon the parties, arises. Shackelford asks by the bill a reformation of the written instrument, so as to make it correspond with the agreement which the parties directed to be reduced to writing, which they intended to execute, and which they thought they were executing.

[2.] The chancellor decided, that the complainant's right to relief was lost by laches and lapse of time. A period of more than thirteen years intervened, between the discovery of the fraud perpetrated upon complainant, and the commencement of the suit; but the suit was commenced about nine months after the death of Mrs. Shackelford.

Equity could not permit the imputation of laches against the complainant, until it was possible for him to commence suit, in which a decree could be rendered concluding those having a direct interest against the reformation of the contract. He could not sue until there was a person in being against whom he could institute judicial proceedings. The only persons interested in the reformation of the deed, in the particular in which it misrepresented the intention of the parties to his prejudice, were those who, at the death of Mrs. Shackelford, might be her collateral heirs. Who would be the collateral heirs of Mrs. S. at her death, it was impossible to know while she lived. It could not be assumed, that those who would have been her heirs if she had died at the time when the fraud was discovered, or their descendants, would be such heirs when her death occurred. Intervening deaths might, before she died, have exterminated the entire families of those who would have stood in the relation of heirs to her when the fraud was discovered. Until the death of Mrs. Shackelford, the persons adversely interested could not be known; and it was, therefore, impossible to institute suit against them.

[3.] To the general rule, that the persons interested must be parties to a chancery suit, there is an exception, founded on the doctrine of representation. There are cases, in which parties as plaintiffs are permitted voluntarily to assume, or as defendants are involuntarily charged with, the representation of the rights of persons not before the court. One may sue on behalf of himself and others similarly situated, and a bill may be filed against some persons, on behalf of themselves and all others opposed to the plaintiff's claim, where the parties would otherwise be so numerous that it would be impossible to bring them before the court. But it must be observed that, in such cases, the representation of those persons not parties, by those who are, is only tolerated where all have a common interest in the entire object of the suit, or a common interest in opposing the object of the suit.—Calvert on Parties, 41, (17 Law Library, 25;) *ib.* 43; Mayor of York v. Pilkington, 1 Atk. 284. It is also permitted, that he

who is entitled to the first vested estate of inheritance shall represent those entitled in remainder or in reversion ; and it is sufficient to bring the tenant for life before the court, where those who are to take in remainder are not *in esse*. 1 Daniell's Ch. Pl. & Pr. 274, 275 ; Story's Eq. Pl. §§ 144, 145.

This doctrine of representation is predicated, in part, upon the convenience and necessity of the thing ; but it is also founded upon the supposition, that the community of interest between the parties to the suit and those whom they represent, will secure a faithful representation. Hence it is, as above stated, that one party can never sue or be sued on behalf of other numerous absent parties, unless there is a community of interest in the question to be decided. And so a tenant in tail, or for life, can never represent those in remainder, or in reversion, unless there is an interest in the question common to the representative and to those represented. The "important principle in favor of the doctrine is, that in the person of the" representative "there is brought before the court one whose interest is of such a nature, as to insure his giving a fair trial to the legal right."—Calvert on Parties, 50, 41.

If a suit should be brought, which affects the entire fee, it is sufficient to bring before the court the persons whose estates make the first inheritance ; because the suit reaches the entire fee, and affects those having the first estate of inheritance, as well as those entitled in remainder or in reversion ; and there would be an identity of interest in the question between the parties before the court and those not brought before the court.—Calvert on Parties, 189. In the case of Gifford v. Hart, 1 Sch. & Lef. 408, this doctrine is treated as applicable to those cases which relate "to the whole estate," and, consequently, affect alike the tenant in tail or for life, and the remainder-man or reversioner. Lord Eldon, in his opinion deciding the case of Lloyd v. Johnes, 9 Vesey, 57, distinguishes between the cases where the remainder-man is and is not bound by the decree against the tenant in tail ; and allows to the decree an operation against the remainder-man in the case where the suit is not founded upon contract by the



tenant in tail, but is brought to bind the land in respect to charges created by the author of the gift, and imposing them, therefore, upon all who take *per formam doni*. Story's Eq. Pl. 144, note 1, and § 147; Long v. Yonge, 2 Sim. 384; Pelham v. Gregory, 2 Eden, 521; Eagle Fire Ins. Co. v. Camlet, 2 Edw. Ch. 127; Sohier v. Williams, 1 Curtis, 497; also, authorities on this point cited for the appellants.

We find, after a most careful examination, no authority for the proposition, that a remainder-man can be affected by a litigation between one asserting a right hostile to him and the tenant of the preceding estate, when the latter had no interest whatever in the litigation. The authorities which we have adduced condemn such a proposition, and it seems irreconcilable with reason and justice. It would impose the costs and expense and responsibility of a litigation upon one having no interest in it, and no right to be affected by it. But the fault of the proposition is most striking and clear in this, that it would place at the mercy of the holder of the antecedent estate the rights of those to come after him, without affording any guaranty of good faith or diligence. An estate in remainder would be worthless, if it could be defeated by a suit with the tenant for life, in which the latter had no interest to be affected. The doctrine of representation is consistent with justice and reason and right, only when the representative has a common interest with the represented, so that the protection of his own interest will include the protection of the rights which he represents.

In the question of the reformation of the deed, so as to make it convey to Shackelford the same interest which is conveyed to the heirs of Mrs. Shackelford, the tenant for life had not the slightest interest. If a suit had been brought against Mrs. Shackelford in her life-time, for the purpose of reforming the deed, so as to give the property to her husband in the contingency of her dying before him without issue, there would have been imposed upon her the burden and expense of protecting interests, with which she had no connection, and depending upon a question of no concern to her. The law would be unjust

in imposing such a burden upon her; and it would be still more unjust in divesting the rights of the remainder-men in a proceeding to which they were not parties, either actually or by representation of their interests. The law would not have tolerated a suit for the reformation of the deed in the particular described, against the tenant for life.

Until the death of Mrs. Shackelford, there was no person against whom Shackelford could have maintained a suit, the decree in which would have concluded the persons whose interests would have been directly affected by the reformation of the contract; and laches cannot be imputed to him for the failure to bring an earlier suit. We decide, therefore, that the decree of the chancellor, dismissing the bill upon the ground of laches, was erroneous.

The following authorities present analogies, which sustain the argument of the foregoing opinion, and we therefore cite them: *Powell v. Wright*, 7 Beavan, 449-50; *Story's Eq. Pl. §§ 81, 83, 87, 130, 131, 96, 133*, note 1; *Goodess v. Williams*, 2 Y. & C. 595; *Browne v. Blount*, 2 Russ. & M. 83; *Grace v. Torrington*, 1 Collier, 3; S. C., 2 Collier, 53; *Rayley v. Best*, 1 Russ. & M. 659.

The decree of the court below is reversed, and the cause remanded.

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### ANONYMOUS.

[BILL IN EQUITY, BY CHILDREN CLAIMING UNDER MARRIAGE-SETTLEMENT, FOR PARTITION OF PROPERTY AND GENERAL RELIEF.]

1. *Admissibility of declarations as affecting validity of deed.*—Where the validity of a marriage-settlement is in controversy, in a suit between the surviving husband and his wife's children by a former marriage, the declarations of the husband and wife, made after the execution of the settlement, are not competent evidence against the children.

2. *Validity of deed as affected by duress.*—A marriage-settlement, executed by a widow two days before her intended second marriage, conveying her property in trust for her separate use during life, with remainder to her children, cannot be held to have been obtained by duress on the part of the children, on proof of the grantor's distressed state of mind at the time of its execution, and of threats made by her son against her intended husband, which were not communicated to her; it appearing that her distress, as well as the threats of her son, were caused by the fact that she was then pregnant by her intended husband.
3. *Validity of secret marriage-settlement.*—A marriage-settlement, secretly executed by a widow two days before her intended second marriage, without the knowledge of her intended husband, conveying her property to her separate use during her life, with remainder to her children, cannot be held fraudulent as against the husband's marital rights, in a controversy between him and the children, when it appears that, at the time the settlement was executed, the widow was pregnant by her intended husband.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. JOHN FOSTER.

The complainants in this case, who were the children and grand-children of Mrs. Nancy E. C. by her first husband, filed their bill against her surviving second husband, Samuel B. W., and the children of said second marriage; asking a partition of certain slaves, and general relief. The complainants claimed these slaves under a deed which was executed by Mrs. C. in South Carolina, in 1827, two days before her intended second marriage; and by which these slaves, with some other property then belonging to her, were conveyed, in consideration of natural love and affection, to her children born and to be born, after reserving a life estate to herself. Answers were filed by the defendants, insisting that said deed was void on account of duress, and also because it was executed in anticipation of the grantor's second marriage, without the knowledge or consent of her intended husband, and was, therefore, a fraud on his marital rights. On final hearing, on pleadings and proof, the chancellor held the deed void, and therefore dismissed the complainants' bill; and his decree is now assigned as error. A statement of the facts in detail is not deemed necessary to a correct understanding of the legal principles decided.



WM. P. CHILTON, and M. J. TURNLEY, for appellants.  
JAS. B. MARTIN, and G. C. WHATLEY, *contra*.

STONE, J.—It is contended for appellees, that the deed of Mrs. Nancy E. C., dated June 12th, 1827, was obtained by threats and duress on the part of her children. The testimony relied on in support of this proposition is that of Mr. D., and Mr. and Mrs. B. The testimony of Mr. D., who is brother to Mrs. C., is by far the most important.

In pronouncing on this question, we feel it our duty to disregard, as illegal evidence for appellees, all that either Mr. or Mrs. W. said after the deed was executed.—See *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong v. Brewer*, *ib.* 706; *Foote v. Cobb*, 18 Ala. 585. This limits the testimony of Mr. D. on this point to what he says took place in the office of Mr. C., [an attorney] the day the deed was executed. On that day, Mr. C., Mr. W. and Mr. D. were present. Mr. F., the other subscribing witness, was also present a part of the time. Mr. D. does not pretend that anything was communicated to him privately; but the language of his testimony tends strongly to the conclusion, that what Mrs. C. stated was uttered aloud, in reply to what Mr. C. had said to her, and in the hearing of all present. If this be so, he stands contradicted positively by Mr. C. and Mr. W., and by strong implication in the testimony of Mr. F. In giving his testimony, Mr. D. betrays a want of accuracy as to the property conveyed, and the length of time which elapsed between the making of the deed and the solemnization of the marriage, which renders it extremely unsafe to trust his recollection. He is also contradicted by W., as to the object for which these two witnesses were procured to be present at the time.

It is not our purpose to reflect on the integrity of Mr. D. His testimony relates to a transaction which, when he deposed, was thirty years old; and all men are liable to errors after so great a lapse of time. What we intend to affirm is, that the witnesses C. and W. betray a more

intelligent appreciation and recollection of the transaction, and we accord to their testimony the greater weight.

The chancellor founds his decree on this point mainly on the distressed state of feelings exhibited by Mrs. C. while the deed was being prepared and executed. Her distress of mind is shown by the testimony of Mr. W., as well as that of Mr. D. We do not regard this circumstance as sufficient to establish the charge of coercion in procuring the deed. She was doubtless conscious that she was soon to be somewhat degraded from her former social position. It is probable that her family and friends, if not others, were already acquainted with her digression from the path of propriety. The testimony of many of the witnesses, including Mr. D., tends to show that the wrath of her son was caused by the disgrace which Mr. W. had brought upon their mother. We think her distress of mind may, with as much probability, be charged to a consciousness of impending disgrace, as to any fears she may have entertained that her son would lay violent hands on Mr. W.

The testimony of the witnesses, Mr. and Mrs. B., bearing in mind the great lapse of time between the occurrences about which they testify, and the giving of their evidence, should, we think, weigh but little. They speak of threats made by the eldest son and by a daughter of Mrs. C. The son was then probably under age, and the daughter much younger. There is no evidence that these threats were ever communicated to Mrs. C., and we do not think them sufficient to invalidate the deed on the ground of duress.

Two facts, in the absence of satisfactory evidence of threatened violence to the person of Mr. W., are decisive to turn the scale against this ground of relief. First, the reasonableness of the presumption that Mrs. C., knowing the habits and poverty of Mr. W., would desire to secure her property beyond his power to charge it. This presumption is strengthened by the testimony of W. Second, that Mr. W., after the marriage, and as long as he remained in South Carolina, some eight or nine years, did not claim the property as his own, but spoke of it as

belonging to his wife. Nor do we hear of any effort on his part to undo the deed of June 12th, 1827, until the year 1848—a period of more than twenty years. These circumstances, with the evidence stated above, are to our minds conclusive against the charge of actual fraud, violence and duress, relied on in the answer of Mr. W.

This case, then, is narrowed down to the following inquiry: Is the deed of June 12th, 1827, constructively fraudulent as against the marital rights of Mr. W.? The facts are these: Mr. W. and Mrs. C. had an engagement to marry; they cohabited together, and Mrs. C. became pregnant. In this situation, two days before the marriage, Mrs. C. by deed settled her property to her sole and separate use and enjoyment during her life, and at her death to her children by a former marriage, and such children as she might afterwards have. The testimony does not inform us that Mr. W. assented to the making of this deed, or had knowledge of it, until after the marriage. It is contended for appellants, that Mr. W., by force of the situation in which his conduct had placed Mrs. C., put it out of her power to retire from the marriage; that she was thus under moral duress, and could not, in the matter of requiring a settlement, deal with him on equal terms; and that this excuses her for resorting to the only expedient left her, of making a secret settlement.

One argument urged by appellees against this view, is as follows: Conceding that the chancellor, if Mr. W. were the actor in this suit—had himself invoked relief against this deed—would not, for the reason above stated, become active in his favor; still, a different rule applies, when the powers of the chancery court are invoked in aid of a deed thus obtained: that while chancery will withhold all assistance from a husband thus in fault, it will nevertheless refuse all active sanction of a transaction which the law characterizes as a fraud upon the rights of the husband.

We concede that there are many transactions, where chancery will not lend its aid to either party, but will leave them to such redress as the law can afford them. See 2 Story's Eq. §§ 736, 737, 742, 749, 750, 751, 767, 771



## Anonymous.

to 779; *Ib.* 769; Blackwilder v. Loveless, 21 Ala. 371; James v. State Bank, 17 Ala. 69; Pulliam v. Owen, 25 Ala. 492.

In the case of Hunt & Frowner v. Acre & Johnson, 28 Ala. 589, 598, which presented the question of a usurious defense, we held, that "the rule, that a plaintiff, who comes into a court of equity for relief against a judgment at law, or other legal security, on the ground of usury, can not be relieved except upon the terms of paying to the defendant the principal and legal interest, applies to cases where the debtor has, by *his own voluntary act*, *deprived himself* of the opportunity to appear in the character of the defendant and plead the usury." If we were to apply that rule to this case, it is manifest that the complainants, *by no voluntary act* of theirs, have made it necessary that they shall assert their claim as actors in a court of chancery. The accident, which prevents them from joining as plaintiffs the other remainder-men, and thus asserting their claim at law, rendered a resort to chancery necessary. We do not, however, propose to base our opinion on this principle. If there be any merit in the excuse urged for making the *ex-parte* settlement of her property by Mrs. C., it rests on the independent equity with which Mr. W. had, by his conduct, armed her, viz., that she was placed in moral duress by his act; that, in her then condition, she had no power to prescribe terms on which the marriage should take place; that to require his assent to the settlement, would be simply an abandonment of her right to make it; that thus having an undue advantage of her, he will not be heard in equity to complain that the settlement of her property on herself during life, and afterwards for the equal benefit of all the children she might have, was a fraud upon his marital rights.

The precise question we are considering was before the English court of chancery, in the case of Taylor v. Pugh, 1 Hare, (23 Eng. Ch.) 608. The vice-chancellor refused to set aside the settlement, which was made by the intended wife on the eve of her marriage, and without the knowledge of her future husband; which settlement, like that made by Mrs. C., secured the property to herself dur-

ing life, and afterwards to her children. The language of the court was: "By his (the husband's) conduct towards her, retirement from the marriage was on her part impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the whole of her fortune. The only way in which a woman can insist upon a settlement, is by making it a part of the marriage treaty that her property shall be settled. The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court, with any effect, that his wife has committed a fraud upon him, because she has taken the precaution to have her property secured for herself and her children. I am very far within the limits of authority in saying, that a woman, in the view of this court, commits no fraud on her husband, if, in circumstances like the present, she takes the only means he has left her of protecting herself—that of making a settlement without his knowledge."

It will be observed that the vice-chancellor characterizes the husband as a *seducer*; speaks of his *bringing his intended wife to his house*, and *inducing her to cohabit with him*. The report of the case contains no statement tending to show that the husband, by any act of his, induced the said Elizabeth to take up her abode at his house; nor does it show that he seduced her, or induced her to cohabit with him, further than those conclusions are inferable from her pregnancy at and before her marriage. No fact is shown which can in the least enable us to determine whether the husband or the wife was most in fault. Nor do we think this inquiry was deemed material by the vice-chancellor. He based his decree, not on the fact that the husband was most in fault, but on the fact that he had placed it out of the power of the wife to protect herself, by requiring a settlement. On this ground, the court said, not only that the husband had *precluded* himself from telling the court, *with any effect*, that

*the wife had committed a fraud upon him*, but added in another place, that she had in fact committed *no fraud upon him*.

The language of the court, copied above, implies much more than that, owing to the conduct of the husband, the court would not interfere actively in his behalf. It in effect declares, that the secret settlement made by the wife, on the eve of her marriage, was, under the circumstances, purged of all imputation of fraud upon the marital rights of her intended husband.—See 1 Story's Eq. § 273, and note.

We fully approve the principles settled in *Taylor v. Pugh*, *supra*, and make them the basis of our decree.

From what we have said it necessarily results, that the chancellor erred in dismissing complainants' bill. He should have granted them relief.

Reversed and remanded.

A. J. WALKER, C. J., not sitting.

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## VAUGHN AND WIFE vs. LOVEJOY.

[BILL IN EQUITY FOR PARTITION, ACCOUNT, &c.]

1. *Validity of condition in restraint of marriage annexed to legacy*.—A condition or limitation in restraint of the marriage of a widow, when annexed to a devise or bequest by her husband, is valid.
2. *Misjoinder of parties plaintiff*.—The rule is well settled, that where two join as plaintiffs in a bill, both must have an interest in the subject-matter of the suit, and both be entitled to relief; and if the bill itself shows that one of them is not entitled to any relief, it is demurrable.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Noel A. Vaughn and Sarah A., his wife, against Jeremiah F. Lovejoy and wife, George M. Goldsmith, and Caroline S. Goldsmith; Mrs. Lovejoy and her co-defendants, George M. and Caroline



S. Goldsmith, being the children of Mrs. Vaughn by a former husband, John T. Goldsmith. Its object was, 1st, to enjoin proceedings in the probate court, which had been instituted by the defendants, to compel the complainant, Vaughn, to settle his guardianship of Mrs. Lovejoy and George M. Goldsmith, and have the accounts settled in the chancery court; and, 2dly, to have certain slaves, which were in the possession of Vaughn, and in which Mrs. Vaughn claimed an undivided interest under the will of her former husband, sold and divided between her and her children. John T. Goldsmith, whose will forms the subject of controversy in the case, died in said county of Chambers, in April, 1846. By the 8th clause of his will, he devised and bequeathed to his wife and their three children a small tract of land, several slaves, and some other personal property. The 12th clause was in these words: "I design that all the effects which I have given to my wife, to be hers in fee simple if she never marries, but, if she marries, to revert to their three children, except one horse, saddle and bridle, one bedstead and furniture, and two cows and calves." The chancellor held, that Mrs. Goldsmith, by her marriage with Vaughn, forfeited her interest in the slaves, and was therefore improperly joined as a co-plaintiff with her husband. He consequently sustained the defendants' demurrer on account of such misjoinder, and dismissed the bill; and his decree is now assigned as error.

RICHARDS & FALKNER, for the appellants.

BROCK & BARNES, *contra*.

R. W. WALKER, J.—Conditions operating unduly in restraint of marriage, are utterly null and void, because they are considered contrary to the common weal and good order of society.—*Morley v. Rennoldson*, 2 Hare, 570; 2 Leading Cases in Eq., pt. 1, 315. In accordance with this principle, it is a well-settled rule, subject to certain clearly established exceptions, that if a condition in restraint of marriage is general, and also subsequent—that is, if the gift be of a certain interest, and there is an at-

tempt to abridge it by a condition in restraint of marriage generally, the condition is void, and the original gift remains.—*Morley v. Rennoldson*, *supra*; 2 Leading Cases Eq., pt. 1, 319–20; 1 Jarm. on Wills, 843, 836. Some respectable authorities hold, that the rule just stated is applicable alone to bequests of personalty, which, in this regard, are governed by the principles of the civil law; while devises of land, on the contrary, are governed by the common law, according to which, it is said, a condition in general restraint of marriage is not invalid.—*Commonwealth v. Stauffer*, 10 Barr, 350; *McCullough's Appeal*, 2 Jones' Pa. 197; *Williams' Perso. Prop.* 290, note 1. But the current of authority seems to support the idea that the rule is applicable alike to devises and bequests. 2 Lead. Eq. Cases, 319. Many of the cases, however, draw a marked distinction between a *condition* and a *limitation*; and although it is clear that a restraint upon marriage is equally effectual, whether it is put in the form of a condition in avoidance of a vested bequest, or of a limitation that the gift shall endure only so long as the legatee shall remain unmarried; and although, moreover, it is true, as remarked by Chief-Justice Gibson, in *Commonwealth v. Stauffer*, 10 Barr, 357, that “whether the restraint be by limitation or condition, is, in a vast majority of cases, the effect of accident, depending on the turn of expression habitual to the scrivener, who seldom knows anything of the technical difference between them;” yet the English authorities certainly support the proposition, that where property is limited to a person until marriage, and upon marriage then over, the limitation is good. It is said that, in such a case, there is nothing to carry the gift beyond marriage; and that the questions which arise as to conditions subsequent in restraint of marrying do not apply. “There can be no doubt,” says Lord Cottenham, “that marriage may be made the ground of a limitation ceasing or commencing;” or, as it is expressed by Godolphin, “the use of a thing may be given during celibacy, for the purpose of an intermediate maintenance, and will not be interpreted maliciously to a charge of restraining marriage.”—*Webb v. Grace*, 2 Phill. 701; *Richards*

v. Baker, 2 Atk. 321; Sheffield v. Lord Orrery, 3 Atk. 282; Morley v. Rennoldson, 2 Hare, 580; Lloyd v. Lloyd, 10 Eng. L. & E. 139-143; Heath v. Lewis, 17 Eng. L. & E. 41; Scott v. Tyler, 2 Brown's Ch. 431; 2 Greenl. Cruise, 24, § 66, and note; McNaghten's Select Cases, 3; Gibson v. Dickie, 3 M. & S. 462; 2 Lead. Cases Eq., part 1, 321, &c.

Accordingly, it has been frequently held, that where an estate is given during widowhood, with a limitation over, the estate is determinable by the second marriage.—Authorities *supra*; Jordan v. Holkham, Ambler, 204; Fitchett v. Adams, 2 Str. 1128; Miller v. Flournoy, 26 Ala. 724; Willard's Eq. 531; Lloyd v. Lloyd, 10 Eng. L. & E. 139. And an annuity during widowhood, or celibacy, has also been held good.—Authorities *supra*; Barton v. Barton, 2 Vernon, 308; Heath v. Lewis, 17 Eng. L. & Eq. 41.

Besides, the rule which avoids a condition subsequent in general restraint of marriage, does not apply to devises or bequests by a husband to his wife. The reasons in which the rule has its origin, apply with greatly diminished force to prohibitions of marriage, when annexed to gifts of property by a husband to his widow; and such prohibitions are subject to other considerations, which have very properly induced the courts to maintain their validity. A husband may well desire to leave the control of the whole or the greater part of his property to his widow, as the best means of keeping his children together, and of providing for their education, comfort and happiness; and yet very reasonably be unwilling to entrust her with the same power after she has contracted a second marriage, and a stranger has become the head of his household. "It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood."—Commonwealth v. Stauffer, 10 Barr, 355. Reason and experience, as well as the adjudged cases, sanction the idea, that a man has an interest in his wife's remaining a widow; and although



the principle has been sometimes doubted (see *Binnerman v. Weaver*, 8 Md. 517; note to *Greenl. Cruise*, page 24, § 66), yet the great weight of authority, both in England and the United States, establishes the proposition, that a restraint upon the re-marriage of a widow, annexed to a devise or bequest by the husband, is valid,—whether the restraint be in the form of a limitation, defining the duration of the wife's interest, or of a condition subsequent, abridging or defeating it after it has vested.—*Scott v. Tyler*, 2 Brown's Ch. 487–8; *Sheffield v. Orrery*, 3 Atk. 282; *Lloyd v. Lloyd*, 10 Eng. L. & E. 139–143; *Phillips v. Medbury*, 7 Conn. 568; *Pringle v. Dunkley*, 14 Sm. & M. 16; *Hughes v. Boyd*, 2 Sneed, 512; *Dumey v. Schœffler*, 24 Missouri, 170; *Same v. Same*, *ib.* 177; 2 Leading Cases Eq. pt. 1, 321, &c.; 1 Story's Eq. § 285; *Willard's Eq.* 531–2; 1 Jarman on Wills, 731–2.

Nor, under our laws, is there in this rule any hardship of which the widow can justly complain. By our statute, she may, at any time within twelve months, renounce the provision which her husband has made for her, and take her distributive share of his estate, freed from all restraints denying to her the privilege of a second marriage.

It makes no difference, therefore, whether the form in which the testator has in this case sought to restrain the re-marriage of his widow, is to be deemed a condition subsequent or a mere limitation: it is alike valid, in either aspect. It follows as the result of this, that Mrs. Vaughn has no interest in the slaves named in the bill and no right to relief.

[2.] The rule is well established, that where two join as complainants, both must have an interest in the subject-matter of the suit, and both be entitled to relief; and if the bill itself shows that one of the complainants is not entitled to relief, it is demurrable.—*Moore v. Moore*, 17 Ala. 631; *Tucker v. Holly*, 20 Ala. 426.

The decree of the chancellor is affirmed.

## ALLEN vs. MARTIN.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Commissions of guardian on receipts.*—Under the provisions of the Code, (§§ 2039, 1825,) a guardian is not entitled, on settlement of his accounts, to more than two-and-a-half per cent. commissions on the amount of his receipts.
2. *Commissions on disbursements.*—A guardian is not entitled to commissions on the amount of money which is ascertained on final settlement to be in his hands, and for which a decree is rendered in favor of his ward; that not being a disbursement.

APPEAL from the Probate Court of Montgomery.

ON final settlement by Abram Martin of his accounts as guardian of Wade H. Allen, his late ward, the court allowed the guardian five per cent. commissions on the amount of his receipts, and two-and-a-half per cent. on the amount of his disbursements; and in ascertaining the amount of his disbursements, a balance of over \$24,000 in the guardian's hands, for which a decree was rendered against him in favor of the ward, was included. To each of these rulings of the court the ward excepted, and he now assigns them as error.

CHILTON & GUNTER, for the appellant.

A. MARTIN, and JOHN A. ELMORE, *contra*.

A. J. WALKER, C. J.—The two questions in this case are, whether a guardian can be allowed five per cent. commissions upon his receipts, and whether the payments to his ward, after attainment of majority, are disbursements upon which he is entitled to commissions.

[1.] Section 1825 of the Code makes two-and-a-half per cent. the maximum limit to the commissions of executors and administrators, on receipts and disbursements, but authorizes the allowance of a just compensation for actual expenses, and for special or extraordinary services. Section 2039 of the Code is as follows: "In the settlement

of the accounts of guardians, and in all the preparatory proceedings thereto, and appeals therefrom, the laws providing for the settlement of the accounts of executors and administrators in this Code, and appeals therefrom, so far as applicable, and not in hostility with any provision of this chapter, applies to, and are in full force against guardians and their sureties." Section 1825, which regulates the compensation of executors and administrators, is a part of "the law providing for the settlement of accounts of executors and administrators," and is susceptible of application to guardians, and is not in hostility with any provision of the chapter in which section 2039 is found. Section 2039 must, therefore, be understood as applying to guardians the rule of compensation which section 1825 prescribes to executors and administrators.

The statute (§ 2039,) in declaring that the laws therein specified "apply to and are in full force *against* guardians and their sureties," means nothing more than that they are binding upon guardians and their sureties. It is not requisite that a rule should be unfavorable or detrimental to guardians and their sureties, in order that they should be bound by it. It is sufficient that it be a law binding and governing them. The rule of compensation has that effect, in prescribing a rate of compensation by way of commissions, beyond which the court cannot go in favor of guardians.

There is no statutory criterion of a guardian's compensation, unless it is governed by the same rule which applies to executors and administrators. There can be no reason for the adoption of a standard of compensation by commissions as to executors and administrators, and not as to guardians. No difference in the character of the trusts authorizes the conclusion that the legislature designed to make such a discrimination. The duty of collecting and disbursing by a guardian is so strictly analogous to the same duty when discharged by an executor or administrator, that there is great reasonableness and fitness in so construing the law as to make the performance of the duty in both cases the ground of a like compensation. The law, as we have seen, is susceptible of that construc-



tion, and we think it reasonable and proper to adopt it. We decide, therefore, that the guardian in this case was not entitled to more, by way of commissions, than two-and-a-half per cent. on his receipts and disbursements.

[2.] We must also decide against the guardian, upon the question of his right to charge commissions upon the balance found in favor of the ward upon the settlement. The money paid over to the ward, in pursuance of the decree on final settlement, was not a "*disbursement*." To disburse money, is to pay it out, not to pay or deliver it to the owner. An agent is said to disburse money, when he pays it out on account of his principal. So a trustee may be said to disburse the money of the trust, when, in the discharge of the duties of the trust, he pays it out, but not when he pays it over to the *cestui que trust*. Disbursement by a guardian cannot be made to include the act of paying over to the ward, without a perversion of its proper and received signification.—Gould v. Hayes, 19 Ala, 461. The commissions on receipts and disbursements are ascertained and credited before the amount due the ward is fixed, and for that amount a decree is rendered. If, upon the payment of the amount of the decree, commissions are due, then there would be a necessity for an accounting before the probate judge after the decree, for the ascertainment of the sum to be retained by way of commissions; and there would be an implied qualification and condition of every decree, that it was subject to a deduction for commissions. A construction of the law leading to such results ought not to be adopted.

As this question has been earnestly discussed by the appellee in an argument pressing his right to the allowance of commissions on the balance paid over to his ward, and as it is a question of extensive interest, about which the probate judges in the several counties have different opinions, we proceed to fortify our decision by further argument. The rule as to the allowance of commissions must be precisely the same in reference to executors and administrators as guardians. This court decided, in *Wilson v. Wilson*, 30 Ala. 670, and in *Jenkins v. Jenkins*, at the last term, that an executor was not entitled to

commissions upon the value of slaves distributed by him. It is true, that decision is confined to the distribution of slaves; but what difference can, upon principle, be made between the distribution of money, and the distribution of slaves? If one decedent leaves ten thousand dollars in money to be divided, and another leaves ten thousand dollars worth of slaves to be divided, upon what principle of justice could commissions be allowed in the former case, and denied in the latter? It would seem that, if there were any discrimination, it should rather be in favor of him who divides slaves, for he would incur the greater difficulty and hazard. There are decisions in Virginia, and perhaps elsewhere, which favor the making of a distinction between the distribution of slaves and money, or other personal property; but we cannot perceive that the reasoning of those decisions is susceptible of application, under our system, to the question before us. The delivery of slaves, or other personal property, to distributees or legatees, would be a disbursement if the payment of money was; and the decisions in *Wilson v. Wilson*, and *Jenkins v. Jenkins*, affirm a principle which is applicable as well to the distribution of money as chattels.

In *Newberry v. Newbery*, 28 Ala. 691, the court remarked, that two-and-a-half per cent. on the receipts and disbursements made the twenty-five dollars which was allowed the administrator by way of commissions, and that that was correct. Upon looking into the account in that case, as found in the record, it is ascertained that the commissions were computed upon the amount paid over to the distributees; and it is contended, that that decision is, therefore, an authority for the allowance of commissions on the balance due. In that case, the administrator complained that the allowance was not enough; and the question before the court was, whether the administrator ought not to have had more than two-and-a-half per cent. There was no question made in the case as to the allowance of commissions upon too large an amount. Besides, the bill of exceptions asserted that the amount allowed to the administrator was two-and-a-half per cent. upon the receipts and disbursements, and the court framed

the expressions of its opinion in reference to the assertion of the bill of exceptions, without looking back into the account filed. It was, therefore, not decided in that case, and was not intended to be decided, that commissions should be computed in favor of the administrator upon the balance due by him.

The allowance to the guardian in this case was made by way of commissions, and we cannot regard it as embracing a compensation for any special or extraordinary services. If such services have been rendered, they may be hereafter made the subject of a special and distinct allowance.

We are sensible that there must arise cases, in which the compensation prescribed by the statute, for the ordinary services of guardians, executors and administrators, is very inadequate; and this may be a case of that kind; but we think the statute is plain, and leaves us no room to mitigate its hardships.

Decree reversed, and cause remanded.

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### EX PARTE LAWRENCE.

[APPLICATION FOR MANDAMUS TO CIRCUIT COURT.]

1. *Construction of agreement of record.*—In an action against a sheriff's sureties on their bond, the plaintiffs having entered a *nolle-prosequi* as to their original complaint, and filed an amended complaint, the parties thereupon entered into an agreement of record, in these words: "That the pleadings in the case of J. M. S. against these defendants, which put in issue the sufficiency of the complaint, the *factum*, or legal effect of said alleged bond, or the right of the plaintiffs to sue on the same, and the judgment rendered by this court or the supreme court on said questions, shall be taken to be, and shall be, the same in this case." At the time this agreement was made, an amended complaint in the case therein referred to had been filed, to which the defendants had interposed a demurrer, on the grounds that the complaint showed that the bond sued on had not been legally executed, and failed to show any right of action in the plaintiff. At the next term, the court sustained the demurrer, and the plaintiff thereupon took a nonsuit, with a bill of exceptions, and carried the case by appeal to the supreme



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court, where the judgment of the circuit court was affirmed. *Held*, that the agreement did not authorize the court, while sustaining a demurrer to the complaint on file, to allow an amended complaint to be filed, obviating the effect of the decision of the supreme court in the other case. (R. W. WALKER, J., *dissenting*.)

2. *When mandamus lies*.—When the circuit court, improperly construing an agreement of record between the parties to a pending suit, allows the plaintiff to file an amended complaint contrary to the terms of the agreement, the supreme court will award a *mandamus* to enforce the agreement.

APPLICATION for a *mandamus* to the circuit court of Pickens, Hon. PORTER KING presiding, to compel the entry of a nonsuit in a case therein pending, wherein Croxton & Henry were plaintiffs, and the petitioners were defendants. The facts shown by the record, which was made a part of the motion, are these :

The action was brought by Croxton & Henry, against C. D. Lawrence and others, as the sureties of one Tandy P. Duncan, deceased, on his official bond as sheriff of said county of Pickens ; and was commenced on the 15th September, 1856. At the ensuing spring term, 1857, the following entry was made in the case : “ This day came the parties, by their attorneys ; and the plaintiffs having, by leave of the court, filed an amended complaint, and entered a *nolle-prosequi* as to the original complaint, on application of the defendants, this cause is continued until the next term of this court ; and in open court the parties agree, that the pleadings in the case of John M. Sprowl against these defendants, (No. 1681,) which put in issue the sufficiency of the complaint, the *factum*, or legal effect of said alleged bond, or the right of the plaintiffs to sue on the same, and judgment rendered by this court or the supreme [court] on said questions, shall be taken to be, and shall be, the same in this case.”

In the case of Sprowl v. Lawrence, referred to in the agreement above set out, the action was commenced on the 26th March, 1857. On the 23d April, 1857, which was a day of the spring term, the plaintiff filed an amended complaint ; to which, on the same day, the defendants filed a demurrer. At the ensuing fall term, 1857, the court sustained the demurrer ; and the plaintiff thereupon took a nonsuit, with a bill of exceptions, and brought the

case by appeal to this court, where, at the January term, 1859, the judgment of the circuit court was affirmed. See the report of the case in 33 Ala. 674.

In the case of Croxton & Henry v. Lawrence, at the spring term, 1859, the plaintiffs asked leave to amend their complaint. The defendants resisted this motion, and moved the court to render a judgment of nonsuit, as had been rendered in the case of Sprowl v. Lawrence, at the fall term, 1857; and, in support of their motion, read to the court the judgment-entry and agreement above set out, together with the pleadings and judgment in the case of Sprowl v. Lawrence, as above stated. On these facts, the court overruled the defendants' motion, "but rendered judgment sustaining the demurrer, as was done in the case of Sprowl v. Lawrence, and refused to render final judgment, that the defendants go hence, &c., as was done in that case on the nonsuit taken by the plaintiff; and then granted leave to the plaintiffs to amend their complaint." The defendants reserved exceptions to these rulings of the circuit court, and they now make them the basis of their application for a *mandamus*, to compel that court to enter a nonsuit pursuant to the terms of the agreement, and to set aside the judgment which was rendered.

E. W. PECK, for the motion.

T. REAVIS, and S. F. HALE, *contra*.

STONE, J.—It is not controverted here, that the agreement entered of record in the circuit court must, as far as its provisions extend, control the decision of this case. The controversy in this court is over the construction of that agreement. In fact, it would be difficult to maintain the proposition, that in civil suits the parties may not, by agreement, make any disposition of the whole or any part of the cause "which seemeth them good."

It may not, perhaps, be out of place to give some attention to the inquiry, for what purpose was this agreement entered into? Its object must have been to relieve *the parties*, on certain questions common to both suits, from

the additional expense of more than one suit, and *the counsel* from the additional labor of more than one issue and trial. The two suits, as to the points covered by the agreement, were identical in law and fact; and conceding to the agreement this object, its policy must command general approbation. The same leading counsel seem to have represented the parties in each suit. Without some agreement, the several suits must probably have gone, *pari passu*, through the stages of pleading, trial, appeal and final judgment, with the accumulating costs usually attendant on such proceedings. It is probable the pleadings in each suit would have raised the same legal questions. If so, each, on these questions, must have shared the same ultimate fate. In fact, we think it may be assumed, looking at the terms of the agreement, that on the points therein mentioned, the parties stipulated that one case should decide both.

It is contended for plaintiffs in the court below—Croxton & Henry—that the agreement exhausted its controlling powers, when the demurrer to a complaint, filed in the form of the amended complaint in the case of Sprowl v. Lawrence and others, was sustained. The circuit court was of this opinion, and gave plaintiffs leave to file an amended complaint. Because of this ruling in the court below, we are asked to control its action by *mandamus*.

The language of the agreement is as follows: "The parties agree, that the pleadings in the cause of John M. Sprowl against these defendants, &c., which put in issue the sufficiency of the complaint, the *factum*, or legal effect of said alleged bond, or the right of the plaintiffs to sue on the same, and judgment rendered by this court or the supreme [court] on said questions, shall be taken to be, and shall be, the same in this case." Now, it is manifest that, by the terms of this agreement, certain proceedings in this case were to be the same as those in the case of Sprowl. These proceedings were not then complete. The amended complaint had been filed, and possibly some action had on it. Much remained to be done afterwards. To prevent multiplication of labor and costs, the agreement stepped in and took the place of pleadings and judg-



ment. On certain points, the pleadings and judgments, had and to be had in the case of Sprowl, "shall be taken to be, and shall be, the same in this case." On what points? The agreement answers the question: 1st, *The pleadings, which put in issue the sufficiency of the complaint.* In other words, the same *form* of complaint, and the same *causes* of demurrer. These must be the same. 2d. The pleadings, which put in issue *the factum, or legal effect of said alleged bond, or the right of the plaintiffs to sue on the same.* The word *or* in this clause means *and*. These also must be the same. 3d. The judgments rendered by the circuit and supreme court *on these questions* are to be the same. On what questions? *The sufficiency of the complaint, which should be put in issue by the pleadings in the case of Sprowl, the factum and legal effect of the bond, and the right of the plaintiffs to sue on said bond so put in issue.* These are *the questions* which, by the terms of the agreement, were to be the same in the two cases, and upon which the judgment in the case of Sprowl, both in the circuit and supreme courts, was to be entered as the judgment in this case. The two cases were, on these points or questions, to travel *pari passu*. The judgment of the circuit court in the one case, was to be the judgment of the circuit court in the other case. If the judgment of the circuit court in the one case should be reversed, the similar judgment of the circuit court in the other case was to be reversed. Any other view of this agreement will leave inoperative all of its provisions, except that which provides for the same form of complaint and issue upon it, and the same judgment upon that issue.

The construction of those who oppose this motion, might be true, and would give the agreement an operation quite as extensive as they concede to it, if, by its terms, it had simply provided for an amended complaint and issue on it, similar to those filed and formed in the case of Sprowl, and a similar judgment to be pronounced thereon. The agreement contains much more than this. It also bound the parties to conform the pleadings and issue in this case, and judgment to be rendered upon

them, to the pleadings, issue and judgment in the case of Sprowl, which presented and disposed of the *factum* and legal effect of the bond, and the right of the plaintiffs to sue on the same. We know no rule of construction which authorizes us to expunge from the agreement these important provisions.

If the opponents of this construction give any operation to the clause last above mentioned, then they are forced to interpolate in the agreement the italicized clause below, and make it read as follows: "The parties agree, that the pleadings in the cause of John M. Sprowl against these defendants, &c., which put in issue the sufficiency of the amended complaint,"—*which issue on the amended complaint presents the question of*—"the *factum* or legal effect of the said alleged bond, or the right of the plaintiffs to sue on the same," &c. We have no canon of construction which authorizes interpolation, where the agreement is, like this, full and complete on its face. The frame of this agreement, we think, requires us to construe those several clauses conjunctively.

The question may very pertinently be asked, why did the parties in this case agree that the same judgment was to be rendered, as was to be rendered in the case of Sprowl? If, as is contended, the agreement expended its force when judgment should be pronounced on the demurrer to the amended complaint, it is difficult to conceive why any stipulation as to the judgment should have been thought necessary. The complaint and grounds of demurrer being the same, the judgment upon them would necessarily have been the same. And why go through this needless formality, if it settled no rights between the parties?

There is nothing in the argument, that the court can not compel the plaintiffs to submit to a nonsuit. If they have made a valid agreement of record that this case shall go out of court by a nonsuit, it is, perhaps, not necessary for us to inquire whether the court, by an order dismissing their suit, can force them to a substantial compliance with their agreement. The nonsuit, in the case of Sprowl, was no part of the pleadings or judgment. It was a vol-

untary act of the plaintiff; thus resting the judgment of the court on the nonsuit taken, rather than on demurrer sustained. The circuit court had pronounced in favor of the demurrer, and this court affirmed its judgment. The case of Sprowl was then out of court by final judgment, but rendered on voluntary nonsuit. The present plaintiffs, having by the agreement the same right to take a nonsuit in this case as was exercised in the case of Sprowl, will not be heard to complain that the circuit court has no power to compel them to take that course.

Take the other view. The circuit court allowed the plaintiffs to amend their complaint. When the complaint was amended, the pleadings were not the same, which put in issue *the factum* of the bond, *its legal effect*, nor *the right of the plaintiffs* to sue on it. This was a palpable violation of the argument.

But the parties went further. They not only by agreement fixed the character of the pleadings, but also the judgment to be pronounced on those pleadings. No matter what the opinion of the court *on these questions* might be in this case, the judgment, *by force of the agreement*, was to follow that rendered in the case of Sprowl. This, then, was not the judgment of the court on questions presented to the judicial mind. It was but the formal entering up of the agreement made by the parties. *Consideratum est*, is not the language of such judgment. How, then, can it be urged that the court, *as a court*, can add to the agreed entry, not what was contemplated by the agreement, but a judgment of the court allowing an amendment of pleadings, on the sufficiency of which it had not pronounced, and, conforming to the agreement, could not pronounce?

It is manifest that the circuit court erred, in allowing the complaint to be amended; and for the correction of such error, we think *mandamus* the appropriate remedy. *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71.

A rule *nisi* is ordered to the circuit court of Pickens county, to show cause why a *mandamus* shall not issue to compel the performance of the agreement of the parties, as herein above construed.



R. W. WALKER, J. (dissenting).—At the time the agreement was made, an amended complaint had been filed in the case of Sprowl v. Lawrence, to which the defendants in that case had interposed a demurrer, assailing the sufficiency of the complaint, and assigning as causes of demurrer, that it appeared upon the face of the complaint that the bond therein described had not been legally executed, and was not a valid obligation, and that the complaint failed to show any legal right in the plaintiff to sue on the bond in his own name. In other words, when the agreement was made, there were on file in the case of Sprowl certain pleadings, namely, an amended complaint, and a demurrer thereto, which put in issue the sufficiency of the complaint, the *factum*, or legal effect of the bond, and the right of the plaintiff to sue on the same. This will be more fully understood by reference to the case of Sprowl v. Lawrence, decided at the last term. These, then, were the pleadings to which the parties in this case referred, as the pleadings which put in issue the specific questions named in the agreement. These pleadings, and the judgment to be rendered on the *questions* specified as arising on them, were to be the same in both cases. It seems to me that my brothers lose sight of the fact, that the amended complaint in the case of Sprowl, and the demurrer thereto, then on file, *did* raise all of the questions specified in the agreement. They seem to consider that the pleadings which put in issue the sufficiency of the complaint, could not be the same pleadings as those which put in issue the *factum*, or legal effect of the bond, and the right of the plaintiff to sue on the same. They treat the agreement as referring to two distinct sets of pleadings—*first*, those which embrace the form of complaint, and the causes of demurrer thereto; and, *second*, those which put in issue the *factum*, or legal effect of the bond, and the right of the plaintiff to sue on the same. A reference to the grounds of demurrer assigned in the case of Sprowl, and the opinion of this court in that case, will clearly show that all the questions are presented by the same pleadings, and that these pleadings were the amended complaint and the demurrer thereto, on file

when this agreement was made. And these, in my opinion, are the pleadings referred to in this agreement, as those which put in issue the particular questions specified. The judgment *on these questions*, and not on any other, is to be same in both cases.

The language of the agreement, when considered in connection with the fact that there were, when it was made, pleadings on file in the case of Sprowl, which put in issue *all of the questions* recited, is convincing proof, to my mind, that these were the pleadings which the parties agreed should be the same in both cases. The entire purpose of the parties was, to make the decision which might be made in the circuit or supreme court in the case of Sprowl, on the particular questions named in the agreement, the rule of decision on the same questions now before us. One of these questions was, the sufficiency of the amended complaint then on file in the case of Sprowl. And the only judgment which has ever been rendered upon either of the questions specified, is that this amended complaint was insufficient. The non-suit which the plaintiff in that case voluntarily took, when that decision was made, was in no sense a judgment upon either of the *questions* named in the agreement; and when that case was brought to this court, the judgment of affirmance here rendered was not a judgment adverse to the present plaintiffs upon any of the questions specified, except to this extent—that the affirmance of the judgment of the circuit court necessarily involved a judgment that the amended complaint was insufficient, for the reasons announced in the opinion of this court in that case. And just here it must be noticed, that in the very opinion in which this court decides one of the three questions specified against the plaintiffs, it decides the other two in their favor. And in that opinion all of the questions named in this agreement are treated by this court, and considered, and decided, as arising on the pleadings which were on file in Sprowl's case, when the agreement was made. For, in that opinion, and upon those pleadings, we considered and decided the questions at issue between the parties in relation to the *factum*, or legal effect of the bond, and the right of the plaintiffs to

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sue on the same. Here, then, is a judicial ascertainment by this court that all of the questions specified were put in issue by the pleadings which were on file in Sprowl's case, when the agreement was made. Now, what reason is there for holding that the agreement referred to any pleadings except those which were then subsisting, and which fully answered the descriptions given by the parties themselves of the pleadings which were to be the same in both cases?

It appears from the agreement, that the plaintiffs in the present suit had, at the same term of the court at which the agreement was made, entered a *nolle-prosequi* as to their original complaint, and had, by leave of the court, filed an amended complaint. This amended complaint is not set out in the record; but, under the agreement, we must consider it as having been identical with the amended complaint in the case of Sprowl. In my opinion, the agreement is fully executed by the rendition of a judgment in this case, sustaining the demurrer to this amended complaint. Such a judgment would not deprive the plaintiffs of a right to amend their complaint anew, by leave of the court. For these reasons, I dissent from the opinion of the majority of the court.

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### EX PARTE SMITH.

[APPLICATION FOR PROHIBITION TO CHANCERY COURT.]

1. *How nature of bill is determined.*—The real nature of a bill in chancery is to be determined rather by its substance—that is, by its allegations and object—than by the title given to it by the pleader.
2. *Bill to impeach final decree for fraud.*—A bill which seeks to impeach a final decree for fraud, is not a bill of review, nor a supplemental bill in the nature of a bill of review, but an original bill in the nature of a bill of review.
3. *When decree of divorce may be impeached for fraud.*—A decree of divorce, rendered by a chancery court in this State, may be impeached for fraud, by a bill filed for that purpose, before it has been ratified by the legislature.



4. *Jurisdiction of chancellor to decree alimony to wife pending suit for divorce.*—Independent of its statutory powers to make an allowance for the support of the wife pending a suit for divorce, (Code, § 1970,) the chancery court has original jurisdiction to make an order for such allowance to the wife, pending a suit by her to impeach for fraud a decree of divorce in favor of her husband.
5. *When prohibition lies.*—A prohibition will only be granted by the supreme court, where an inferior court has exceeded its jurisdiction, and the relator has no other remedy.

THIS was an application by Jeremiah Smith, for a writ of prohibition, or other remedial process from this court, to be directed to the chancery court of Randolph, Hon. JOHN FOSTER presiding, to vacate, set aside, and prevent further proceedings under an interlocutory order of said chancery court, rendered in a suit therein pending, wherein said Jeremiah Smith was defendant, and Mrs. Margaret E. Smith, his wife, complainant. The record submitted with the application shows the following facts :

On the 7th July, 1856, Jeremiah Smith filed his bill in said chancery court, asking a decree of divorce from his said wife on the ground of adultery. A subpoena was executed on the defendant on the 9th July, as shown by the sheriff's return. A decree *pro confesso* having been duly entered, the cause was submitted for final decree, on the bill, decree *pro confesso* and proof, at the ensuing August term ; and the chancellor then rendered a decree in favor of the complainant, dissolving the bonds of matrimony between him and his wife. On the 13th August, 1857, Mrs. Smith filed her bill in said court, styling it a "bill of review ;" setting out the proceedings had in the divorce suit instituted by her husband ; impeaching the decree therein rendered on the ground of fraud, and asking that it might be reviewed and reversed, and that such other relief might be granted as the justice of her case might require. After the defendant had filed an answer to this bill, Mrs. Smith applied to the court, by petition, asking alimony *pendente lite*, and an allowance to enable her to carry on her suit. In response to this petition, the chancellor rendered an interlocutory decree, ordering the defendant to pay his wife, for her support and maintenance pending the suit, the sum of two hundred dollars

*per annum*, in semi-annual payments, and the further sum of one hundred dollars to her solicitors. The rendition of this decree is the matter complained of by the petitioner.

JOHN T. HEFLIN, for the petitioner.

J. FALKNER, with SMITH & AIKEN, *contra*.

R. W. WALKER, J.—The real nature of a bill is to be determined rather by its substance—that is, by its allegations and object—than by the title which the pleader chooses to give it. The bill in this case is called by the complainant a bill of review. It is obvious, however, that it is not a bill of review; for that cannot be filed, except upon the ground of error on the face of the decree, or of new matter which has arisen or been discovered since the publication of testimony in the original suit. Nor is it what is termed a supplemental bill in the nature of a bill of review, for this also is founded upon the occurrence or discovery of new facts. The object of the bill is to impeach a final decree for fraud; and this can only be done by an original bill filed for that purpose. Such a bill is sometimes called an original bill in the nature of a bill of review.—Story's Equity Pl. § 426; *Munsell v. Morgan*, 3 Brown's Ch. 74, 79; *Mitf. Eq. Pl.* 113; *Edmondson v. Mosby*, 4 J. J. Marsh. 497; *Allen v. McLellan*, 2 Jones' (Pa.) 328.

In the case of *Greene v. Greene*, 2 Gray, 361, the supreme court of Massachusetts held, that a decree for divorce from the bonds of matrimony, rendered by a court having jurisdiction of the subject-matter and the parties, (the defendant either appearing, or being legally summoned to defend,) cannot, although obtained by fraud and false testimony, be set aside on an original libel filed at a subsequent term.—See, however, *Bishop on M. & D.* §§ 697–9. But in that case, the decree which was sought to be annulled operated a dissolution of the marriage, and fixed the *status* of the parties. Such, as we will see, was not the effect of the decree which this complainant has

assailed, and the reasons on which the decision just cited is founded are inapplicable.

Article 6, section 13, of the constitution of this State, is in these words: "Divorces from the bonds of matrimony shall not be granted, but in cases provided by law, by suit in chancery; and no decree for such divorce shall have effect, until the same shall be sanctioned by two-thirds of both houses of the general assembly." This language is so plain as to leave no room for reasonable controversy; and we have no hesitation in declaring it as part of our fundamental law, that a decree for divorce from the bonds of matrimony, rendered by a chancery court in this State, has no effect as a dissolution of the marriage relation, until it has received the sanction of the legislature.—See *Harrison v. Harrison*, 19 Ala.

The marital relation between these parties was, then, still subsisting when the complainant filed her bill, impeaching as fraudulent the decree rendered in favor of her husband. Under these circumstances, we have no doubt that the chancery court had jurisdiction of the case made by the bill.

Section 1970 of the Code is in these words: "Pending a suit for divorce, the court must make an allowance for the support of the wife, out of the estate of the husband, suitable to his estate and the condition in life of the parties." The chancellor held, that this case, though not falling within the letter of the section just quoted, was embraced by its spirit and design; and he rested his authority to make the order here complained of, upon this provision of the Code. The ground on which we prefer to place our decision, relieves us of the necessity of expressing an opinion on this point.

According to the common law of England, as administered in the ecclesiastical courts, alimony *pendente lite*, and money to defray the expenses of the suit, are allowed as incidents to a suit for a divorce, whether the wife be complainant or defendant.—*Bishop's Mar. & Div.* §§ 569, 574; *Shelf. M. & D.* 586-7; *Frith v. Frith*, 18 Geo. 271; *Coles v. Coles*, 2 Md. Ch. D. 341; *Osgood v. Osgood*, 2 Paige, 621. The principle is, that the wife's right



to these allowances grows out of the relation between the parties, and the nature of the proceeding. We have no ecclesiastical courts here, but the jurisdiction which they exercise over the subject of divorce, is with us confided to the chancery court. The jurisdiction is to be exercised according to the rules and principles established by the common law, except so far as those rules and principles may be in conflict with our statutes, or with the genius of our institutions. Hence it follows, that the right of the chancery court to make an allowance for *ad-interim* alimony, and for the expenses of defending or prosecuting the suit, does not depend wholly on the statute, and would exist independent of it; and that it still exists, in all cases in which it was allowed at common law, and as to which the statute is silent.—Bishop's M. & D. § 574; North v. North, 1 Barb. Ch. 241; McGee v. McGee, 10 Geo. 477; Melizet v. Melizet, 1 Parsons' Sel. Cases, 78; Richardson v. Richardson, 4 Por. 467, 479; Mix v. Mix, 1 Johns. Ch. 108.

It become important, therefore, to inquire in what cases, and under what circumstances, these allowances were made by the ecclesiastical courts. Lord Stowell, on one occasion, said: "In suits instituted by the husband or the wife, (for I consider that fact to be indifferent,) the wife is a privileged suitor as to costs and alimony; and on the same principle that the whole property is supposed by law to be in the husband. If the wife, therefore, is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit, and that she should be enabled to procure justice by being provided with the means of defense."—Wilson v. Wilson, 2 Hagg. Consist. R. 204.

Mr. Bishop, in his work on Marriage and Divorce, says: "When a suit is pending for a divorce, either from bed and board, or the bond of matrimony, or to declare a marriage duly solemnized void from the beginning, it is legally improper for the parties to cohabit together; and this without reference to what may be the ultimate result of the suit. The single fact, therefore, that it is pending, is, on the principles already laid down, alone sufficient to entitle the wife, who has no sufficient property of her

own, whether plaintiff or defendant, to alimony during its pendency. It is not so, ordinarily, in other judicial controversies between the husband and wife; for there they may cohabit, here they may not. When, however, a suit for any purpose between a husband and wife is attended by such circumstances as bring it within this principle, he will be compelled to support her separately while it is pending."—Bishop, § 569.

Now, if, before a divorce has been consummated by receiving the legislative sanction, a bill is filed impeaching the decree for fraud, it is altogether proper, we think, that the decree should be suspended, until the application assailing it is heard. Otherwise the divorce might be confirmed by the legislature, pending a proceeding to have it set aside in a court which has the general power to annul such decrees. The power of the court to annul a decree thus confirmed is, perhaps, open to question.—See *Greene v. Greene*, 2 Gray, 361. It thus appears that the marriage-tie had not been dissolved when this bill was filed, and ought not to be until it is heard and disposed of. Here, then, is a litigation between husband and wife, in relation to a divorce, during the pendency of which it is legally improper for them to cohabit. Upon this ground alone, according to the rule stated by Mr. Bishop, the authority of the court (independent of any statute on the subject) to allow alimony *pendente lite* could be upheld. See *Tayman v. Tayman*, 2 Md. Ch. D. 393.

Upon the whole, our conclusion is, that the chancellor did not exceed his jurisdiction in the interlocutory decree rendered in this case. The writ of prohibition is issued to restrain the unauthorized action or proceedings of the inferior courts; but it is never granted, except where the inferior court has exceeded its jurisdiction in the order complained of, and the relator has no other remedy to which he can resort for his protection.—*Ex parte Smith*, 23 Ala. 94; *Ex parte City Council of Montg'y*, 24 Ala. 98 (100); *The People v. Seward*, 7 Wend. 518; *Ex parte Greene & Graham*, 29 Ala. 57.

The application is denied. The petitioner must pay the costs of this motion.

## COMM'RS' COURT OF LOWNDES CO. vs. BOWIE.

## [PROCEEDING FOR ESTABLISHMENT OF PUBLIC ROAD.]

1. *When appeal lies.*—When the proceedings of the commissioners' court, in the matter of the establishment or change of a public road, are removed by *certiorari* to the circuit court, and there reversed, an appeal to the supreme court may be prosecuted in the name of the commissioners' court.
2. *Jurisdiction of commissioners' court in establishment or change of public road.*—The jurisdiction of the commissioners' court, in the matter of the establishment or change of a public road, is dependent on these three things: 1st, an application to the court; 2d, thirty days' notice of the application, by advertisement at the court-house door and three other public places in the county; and, 3d, the location of the road within the county.
3. *Sufficiency of notice.*—It is not necessary that the record should affirmatively show by whom the notice was signed, nor what it contained, nor at what places it was posted up, nor how long it remained posted up: a simple recital in the record, that proof was made of the fact that thirty days' notice of the application had been given, by advertisement posted up at the court-house door and three other public places in the county, is sufficient.
4. *When decision of commissioners' court is revisable.*—In determining the expediency of a proposed establishment or change of a public road, the commissioners' court exercises a *quasi*-legislative authority, and does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the country, the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair; and its decision on the question of expediency is not revisable in an appellate court.
5. *Petition and pleadings.*—Although a petition is necessary, which should properly allege such a state of facts as would seem to make it expedient to grant the proposed change of road; yet a demurrer does not lie to the petition, on account of the supposed insufficiency of its allegations; and the overruling of such demurrer is, therefore, not revisable on error or appeal.
6. *Oath of jury.*—A recital in the report of the jury of viewers, that before acting under their commission they took a specified oath, which corresponds with the requisitions of the statute, is at least *prima-facie* evidence of the fact that they were so sworn.
7. *Waiver of objection to jurors.*—If the contestant is present in court when the jury of viewers is appointed, and also when their report is returned, and does not object to their competency, he cannot raise the objection in the appellate court, that the record describes them as "disinterested freeholders," instead of "householders."
8. *Report of jury, and action of court thereon.*—If the report of the jury of viewers is irregular, the court not only has authority, but it is its duty, to set aside the report, and appoint another jury, to consist of the same or other persons.



9. *Validity of order establishing road at costs of applicant.*—An order establishing or changing a public road is not vitiated by a requisition that the applicant shall give bond, with surety, conditioned that he will open it at his own expense; nor can the contestant complain of such requisition.
10. *Route of road determined by court and jury.*—Although the statute contemplates that the jury shall mark out the route of the road, yet it is the province of the court to direct the location as definitely as possible without an actual inspection of the ground; consequently, it is no objection to the order that it directs the jury to lay out the road along a certain section line, extending a specified number of feet on each side.
11. *Constitutionality of public-road law.*—The public-road law of this State, in providing for the assessment of damages to the person through whose lands any road is opened, and securing the payment of such damages before the property is taken. (Code, §§ 1136-38,) meets the constitutional requisition that "just compensation be made" for private property taken for public use; and when a public road has been changed or established by an order of the commissioners' court, the appellate court cannot revise the discretionary power vested in that tribunal, on the ground that its action was not for the public benefit.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

IN this case, the commissioners' court of Lowndes county, on the application of J. H. Robertson and others, granted an order changing one of the public roads of the county. The application was contested by Samuel W. Bowie, who was made a party to the proceedings for that purpose, and who removed the proceedings by *certiorari* into the circuit court. On the errors assigned in the circuit court, that court reversed the judgment and decree of the commissioners' court, and quashed its proceedings. An exception was reserved to the rulings and judgment of the circuit court, and the same are here assigned as error. The material facts of the case will be readily understood from the opinion of the court.

BAINE & NESMITH, and J. F. CLEMENTS, for appellant.

WATTS, JUDGE & JACKSON, with GEO. S. COX, *contra*.

A. J. WALKER, C. J.—The appellee objects, at the threshold of this case, that the court of county commissioners cannot prosecute an appeal to this court. In the Commissioners' Court of Talladega County v. Thompson,

15 Ala. 134, it was decided, in a controversy as to the establishment of a road, that a writ of error might be taken in the name of the commissioners' court; and in the Commissioners' Court of Russell County v. Tarver, 25 Ala. 480, this court took jurisdiction of an appeal by the commissioners' court in a similar controversy. These decisions are conclusive, in favor of the right of the court of county commissioners to appeal from a judgment of the circuit court, reversing an order of the court of county commissioners for the establishment or change of a public road.

[2.] Three things are requisite to give the court of county commissioners jurisdiction over the matter of the change or establishment of a public road. Those things are, an application to the court, thirty days notice of the application, given by advertisement at the court-house door and at three other public places in the county, and the location of the road within the county. An order establishing or changing a road can only be sustained, when those three facts affirmatively appear from the record.—Commissioners' Court of Talladega v. Thompson, 15 Ala. 134; S. C., 18 *ib.* 694; Code, §§ 1131, 1132.

The minutes of the court of 3d November, 1856, affirm that on that day one Robertson presented a petition, subscribed by himself and forty-two others. The petition is copied on the record, and prays the specified change in a public road. It thus appears affirmatively from the record, that the application contemplated by section 1131 of the Code was made.

[3.] The minutes of the same date also affirm, that it appeared by proof made that thirty days notice of the application had been given, by advertisement posted up at the court-house door and at three other public places in Lowndes county, according to law. This assertion of the record shows a literal compliance with section 1132 of the Code, in the matter of notice. It is objected to this apparently full and sufficient assertion of the record, that it fails to show by whom the notice was signed, or what it contained, or how long it remained posted up, or at what places it was posted up. The contents of the

notice sufficiently appear in the assertion that notice of *the application* was given. It was only necessary that there should be notice of *the application*. There was no necessity for a designation of the public places at which the notices were posted up; it is enough that they were posted up at public places. The statute does not specifically direct by whom the notices should be signed. It would be a criticism upon the record, unfair and unnecessarily severe, for us to intend, either that the notice was so signed as not to give a fair manifestation to the community of the intended application, or that the notice, after being posted up, was pulled down, so as to prevent the fair and *bona-fide* notification intended by the law. We do not wish, however, to be understood as intimating, that the notice would be vitiated, even if the advertisements stuck up at public places had been pulled down.

The petition for the change of the road, and the written application of the appellee to be made a contesting party, and the minutes of the court, at February term, 1857, all show that the road was in Lowndes county. It thus appears, that all three of the requisite jurisdictional facts are affirmatively shown by the record.

[4.] Several objections to the petition were made before the court of county commissioners, by way of demurrer, and the demurrer was formally overruled. Upon the question of the expediency of opening or altering a public road, that court exercises a *quasi*-legislative authority, and its decision is not revisable. In the exercise of that authority, it does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the county, the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair.—Hill v. Bridges, 6 Port. 197; West River Bridge v. Dix, 16 Verm. 446; Hollins v. Patterson, 6 Leigh, 457; 6 Wend. 564; 10 Pick. 358; 4 Halst. 209.

[5.] It is impossible, therefore, to prescribe any state of facts, which, being alleged and proved, give to the applicant a legal right to have a public road opened or altered. The law pronounces no judgment upon allega-



tions made, for or against an application; and pleading would, therefore, be altogether out of place. The law neither requires the court to grant an application, because of the fullness and sufficiency of the allegations of the petition, nor to refuse it because of their insufficiency. The court acts upon its convictions of expediency and policy. The petition required by section 1132 of the Code is not pleading upon which the proceeding is based. The law simply requires that it should be a petition for the establishment or alteration of the road. It is not *necessary* that it should contain any allegations, though it would be *proper* that it should state such facts as would seem to make it politic to grant the prayer of the petition. The demurrer to the petition presented no issue which belonged to the case, and it was totally immaterial what judgment the court pronounced upon it.

[6.] We cannot sustain the objection, that the taking by the viewers of the oath prescribed in section 1134 of the Code is not shown by the record. The viewers state in their report, that before acting under their commission, they took before a designated justice of the peace an oath which conforms precisely to the requirement of the statute. The taking of the oath by the viewers is a duty imposed upon them; and their report that they have taken it, must be deemed at least *prima-facie* evidence of the fact. It is a part of their proceedings under the appointment, and is, like the rest of their proceedings, a proper subject of report.

[7.] The record states, that the seven viewers were "*disinterested freeholders.*" The statute (Code, § 1133) requires that they should be "*disinterested householders.*" The record, therefore, does not conform to the statute in this, that it shows the appointment of "*freeholders,*" instead of "*householders.*" The requisition that householders should be appointed, goes to the regularity of the proceeding, and not to the jurisdiction of the court: it is not one of the matters upon which the jurisdiction depends, as appears in a previous part of this opinion. The contestant may, therefore, waive the objection, so far as he is concerned. At the time when the jury of viewers

was appointed, and thence forward, the party who carried the case by *certiorari* into the circuit court, was before the court of county commissioners as a contestant. Upon the return of the report, the contestant made three specific objections to it; but did not object on the ground that the viewers were not householders. By the failure to object in the primary court that the viewers were not householders, the contestant waived the point. The practice which requires the objection to be made in the primary court, is commendable for its justice and fairness; because the deficiency or inaccuracy in the proceeding could be easily remedied. Besides, that practice is well supported by authority.—Long v. Comm'rs' Court, 18 Ala. 482; Molett v. Keenan, 22 *ib.* 484; Commonwealth v. Inhabitants of Westboro', 3 Mass. 406; Inhabitants of Rutland v. County Comm'rs of Worcester, 20 Pick. 71.

Upon this principle of practice, the result in Keenan v. Comm'rs' Court, 26 Ala. 568, ought, perhaps, to have been different; but the point was not considered by the court, and does not appear to have been in any way called to its attention. It is, therefore, not an authority adverse to our position.

[8.] The court of county commissioners set aside the report of the majority of the first jury of viewers, there being an adverse minority report. The court thereupon appointed another jury of viewers, and afterwards set aside its report, because of its alleged irregularity. The court then re-appointed the viewers last named, and upon the coming in of their report, confirmed it. It is argued, that the court had no power to proceed farther after the reception of one report. We have no doubt, that the court not only has the authority to set aside a report which is irregular, and to reappoint the same viewers, or appoint others, but that it is its duty to do so. But in this case the report of the majority of the viewers first appointed, and the two reports of the viewers last appointed, were, so far as the location of the road was concerned, identical; and it is impossible that the contestant could have been injured by any of the proceedings subsequent to the report of the viewers first appointed.

[9.] The court required Robertson, the applicant for the change in the road, to give bond, with surety, to make the new road, and put it in as good order as was the old road, with his own hands, without calling upon the road-workers. This order was not prejudicial to the contestant. The only person who could be injured by it was the applicant. It cannot vitiate the order directing the change of the road, as it merely prescribes the instrumentality by which the change was to be effected. We cannot infer that the court shut its eyes to considerations of public interest, because it required the applicant to make the road and put it in order.

[10.] Section 1133 and 1134 of the Code certainly contemplate that the viewers should mark out the route of the road. This power of the viewers we do not understand to conflict with the authority of the court to designate the location of the road. On the contrary, it is the province of the court to direct the location, as definitely as may be, without an actual inspection of the ground; and it is the duty of the viewers, in pursuance of such direction, to mark out the precise geographical position of the route. Often there is a margin for the exercise of discretion by the viewers in locating the road between points designated by the court; but it can be no objection that the court has so minutely designated the route that there is left a very small margin for the discretion of the viewers. We decide, therefore, that the proceedings of the court below were not defective because the viewers were directed to lay off the road extending in width a certain number of feet on each side of a certain section line.

[11.] It is argued, that the law authorizing the change and establishment of roads is unconstitutional, in this, that it permits the taking of private property for public use, without just compensation made therefor.—Constitution of the State of Ala., Art. 1, § 13. Sections 1136, 1137 and 1138, clothe the owner of land, within six months after a road is opened upon it, with the right to have an assessment of his damages by a prescribed legal proceeding, and direct payment to be made out of the county



treasury. The assessment of damages is thus provided for, and the payment of them secured with certainty, before the property is taken for the public use; and these rights the owner may enforce as soon as the property is taken. We regard the numerous decisions upon the subject as having established a construction of the constitutional provision, which upholds the validity of a law, authorizing the taking of private property for public use, where the assessment of damages is thus provided for, and their payment thus secured.—*Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Smith v. Helmer*, 7 Barb. Sup. C. R. 416; *People v. Hayden*, 6 Hill, 359; *Hooker v. N. H. & N. Co.*, 14 Cow. 146; 2 Kent's Com. 339; *Sedgwick on Stat. & Const. Law*, 825; *Bates v. Cooper*, 5 Ohio, (Ham.) 118; *Jackson v. Winn*, 4 Littell, 323; 20 Johns. 744.

The argument is made, that the court did not change the road for the public use or benefit, but for the benefit of the applicant; and that, therefore, the constitutional right of the contestant, that his property should only be taken for public use, has been violated. It is a sufficient reply to this argument, that it does not appear that the court did not order the change of the road for the public use; nor does it appear that the road was laid out for the private use of the applicant, nor that the court omitted to consult for the public good in its action. The court, as we have already said, in determining whether a public road, which is a road for the public use, should be changed, exercised a *quasi*-legislative, or discretionary power, which we cannot revise.

The judgment of the circuit court is reversed, and the judgment of the court of county commissioners affirmed; and the appellee must pay the costs of this court, and of the circuit court.

## WALKER vs. WALKER'S EXECUTOR.

## [CONTESTED PROBATE OF WILL.]

1. *Opinion of witness on question of sanity.*—A subscribing witness to a will may give his opinion as to the mental condition of the testator at the time of its execution.
2. *Competency of witness as affected by interest.*—The husband of a female distributee is not a competent witness against the validity of a will propounded for probate, when it is shown that, if the will were set aside, his wife would be entitled to a greater share of the estate, than if it were held valid.
3. *When motion to suppress deposition may or must be made.*—It may admit of question whether a party may not at any time move to suppress a portion of a deposition, on account of objections which go to the substance of the evidence, unless his failure to object to the interrogatory, to which it is responsive, is a waiver of the objection.
4. *To what witness may testify.*—A witness cannot, even though he be a physician, be allowed to testify that the testator "had sufficient capacity to make a will."
5. *General objection to evidence.*—A general objection to evidence, of which a portion is legal, may be overruled entirely.

## APPEAL from the Probate Court of Dallas.

IN the matter of the last will and testament of Joseph K. Walker, deceased, which was propounded for probate by William W. Hardy, the executor therein named, and contested by Thomas Walker, who was a brother and heir-at-law of the testator, on the grounds of fraud, undue influence, insufficient attestation and execution, and mental incapacity on the part of the testator. On the trial of these issues, as appears from the bill of exceptions, the proponent introduced one Hugh R. Wilson as a witness, who was one of the subscribing witnesses to the will, and who testified as follows: "That he was the uncle, by marriage, of the decedent's wife; that since the decedent's marriage, which occurred about two years ago, he had seen him several times, and had stayed all night with him at the house of his father-in-law, and had conversed with him on such occasions; that he had met him occasionally at church, and knew him before his marriage, though his acquaintance was only such as he had with

other young men in the neighborhood. The witness did not say that he knew the decedent intimately, at any time; but he did say that he had known him since he was a small boy. Upon this predicate, the proponent's counsel asked said witness, whether, in his opinion, said decedent was of sound mind when he signed said will; to which the witness answered, that, in his opinion, the decedent was of sound mind at that time." To this question and answer, each, the contestant objected, and reserved exceptions to the overruling of his objections.

The contestant offered one Wiley as a witness, who was the husband of one of the decedent's sisters. "It was admitted, that the decedent died without any child; that the wife of said Wiley was still living, and was a distributee of said decedent's estate; and that, if the said will were set aside, she would receive a greater amount than if it were admitted to probate." On these facts, the proponent objected to the competency of the witness, and the court sustained his objection; to which the contestant excepted.

The proponent offered in evidence the deposition of Dr. Kenneth McKennon, which "was not brought into court by the commissioner, or published, until after the trial was commenced; and it was then opened, on the consent of the proponent's counsel that the contestant might make any objection to the same, when offered, which he could have made before the trial was gone into, if the deposition had then been in court and opened." The 4th interrogatory to this witness, and the answer thereto, were in the following words: "*Int.* 4. If you answer that you visited him [decedent] during the month of March, 1858, then state fully and particularly what was the condition of his mind during that month. Were his conduct and behavior that of a reasonable and sensible man, or the reverse? Did he, or not, have sufficient capacity to transact the ordinary business of life in a sensible manner? Did he, or not, during said month, have sufficient capacity to make contracts or bargains in a reasonable and sensible manner? Was he, during that month, a man of sense, or was he a fool? If you saw him



on the 4th, 5th and 6th days of March, 1858, state particularly the condition of his mind at that time. Was he, in your opinion, of sufficient mental capacity to make a contract, or a will, and to know and understand what he was doing? State any facts or circumstances on which you found your opinion. What did he do? What were the nature and character of his conversation during that time? Did you see him transact any kind of business, and what? If so, in what manner did he do it? was it done sensibly or foolishly?" *Ans.* "He seemed as usual: I saw no difference in him. He spoke rationally: I saw no signs of imbecility or aberration of mind. *His conduct was that of a reasonable and sensible man. He had sufficient capacity to transact business in a sensible manner. He had sense enough to make contracts. He was a man of sense, and not a fool.* I saw him on the times inquired of. *He was capable of making a contract, and of understanding it.* I conversed with him in relation to his condition. He spoke rationally and sensibly. He spoke only in reference to his physical condition. I never saw him transact any business." To each of the italicized portions of this answer the contestant objected, "on the ground that the evidence so offered was illegal and irrelevant," and reserved exceptions to the overruling of his objections.

The contestant also objected to the entire answer of this witness to the 6th interrogatory, which answer was in these words: "He was of sufficient mind, at any of the times when I saw him, to make a will, and to understand what he was doing." The court overruled the objection, and the contestant excepted.

The assignments of error cover all the rulings of the court, to which exceptions were reserved.

BYRD & MORGAN, for the appellant.

PETTUS, PEGUES & DAWSON, *contra*.

STONE, J.—The probate court committed no error, in permitting the subscribing witness, Wilson, to testify to his opinion of the sanity of the testator.—*Roberts v. Tra- wick*, 13 Ala. 84; *Stubbs v. Houston*, 33 Ala. 555;

1 Greenl. Ev. § 440, and notes; 1 Jar. on Wills, 74-5-6; Hughes v. Hughes, 31 Ala. 519.

[2.] Neither did the court err in excluding the witness Wilson as incompetent to testify in this controversy. Wilson v. Sheppard, 28 Ala. 623; Harris v. Plant, 31 Ala. 639; Notes to Burt v. Baker, 2 Smith's Leading Cases, pp. 106 to 156; Robinson v. Tipton, 31 Ala. 595; Smith v. Tal. Br. of Plank Road Co., 30 Ala. 650; Steamer Farmer v. McCraw, 31 Ala. 659.

[3.] Motions were made in the court below to exclude certain portions of Dr. McKennon's testimony; and it is here objected that the motions came too late, because they were not made until after the trial had been entered upon. The exception to the testimony does not go to the form of the inquiry, but to the substance of the evidence. Under these circumstances, it may admit of question, whether the motion to suppress, if the party has not waived his right by failing to object to the interrogatory to which it is responsive, may not be made at any time. McCreary v. Turk, 29 Ala. 244.

There is, however, another and a complete answer to this objection. The bill of exceptions recites, that "said deposition was opened, upon the consent of proponent's counsel that the contestant might make any objection to the same when offered, that he could have made before the trial was gone into."

[4.] Two objections were made to the interrogatories, and subsequently to the answers to them, which may be considered together, as they present substantially but one question. We allude to the last objection to the 4th interrogatory, and the objection to the 6th interrogatory, and the objection to the answers thereto. The 4th interrogatory sought the opinion of the witness, whether the testator had sufficient capacity to make a contract or a will, and to know and understand what he was doing. The 6th interrogatory made the same inquiry in substance, but limited it to testator's capacity to make a will. The witness responded, that testator had sufficient capacity to make a contract and a will.

One of the reasons specified by contestant, why the

will should not be admitted to probate, was, "that said Walker was not, at the date of said paper, or the time of its execution, of sound and disposing mind and memory." It will thus be seen, that the question put to this witness, and answered by him, was the precise question which was presented by one of the issues, to be tried by the jury.

Capacity to make a will is not a simple question of fact. It is a conclusion, which the law draws from certain facts as premises. Hence, it is improper to ask and obtain the opinion of even a physician, as to the capacity of any one to make a will. Under our system, that question was addressed to the jury. All evidence which tended to shed light on his mental *status*—the clearness and soundness of his intellectual powers—should have gone before them. This being done, however, the witnesses should not have been made to invade the province of the jury.—See 1 Greenl. Ev. § 440, and notes; Campbell v. Rickards, 5 Barn. & Ald. 840; Jeff. Ins. Co. v. Cotheal, 7 Wen. 72, 78–9; Jemison v. Drinkald, 12 Moore, 148; Ramadge v. Ryan, 9 Bing. 333; Stark. Ev. vol. 2, part 2, p. 886; Harrison v. Rowan, 3 Wash. Cir. Ct. 580, 587; Hall v. Goodson, 32 Ala. 277.

We are aware that, in Wogan v. Small, 11 Serg. & R. 141, the precise question we are considering was propounded to a witness,—objected to—admitted—and the ruling of the primary court approved in the supreme court of Pennsylvania. The specific and only objection that was made in that case was, that the question was leading. The court considered the question in no other point of view, but held it was not leading. We are not willing to regard this as authority for the admissibility of such evidence.

[6.] The other objections of appellant were, in each case, to a mass of evidence, some portion of which was legal. The court was not bound to grant the motion. Shep. Dig. 596, § 169.

Reversed and remanded.



## RAND vs. OXFORD.

[TROVER BY VENDOR AGAINST PURCHASER OF SLAVE.]

1. *Rights, duties and liabilities of purchaser on rescission of contract.*—On the refusal of the vendor to receive a slave, when tendered back by the purchaser, in a case which authorizes a rescission of the contract on the part of the latter, the purchaser is not bound to abandon the slave, but may retain it as the bailee of the vendor; and the fact that he permits the slave, while thus remaining in his possession, to work voluntarily for him, does not render him liable in trover at the suit of the vendor.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by A. B. Oxford, against W. R. Rand, to recover damages for the conversion of a slave named Sarah. The only plea was the general issue. On the trial, as the bill of exceptions shows, the plaintiff proved, that he sold the slave in controversy to the defendant, in January, 1854, at the price of \$999, and executed to him a bill of sale, containing warranties of soundness and title; that the slave was unsound at the time of the sale, and, in consequence thereof, the defendant tendered her back in rescission of the contract; that the plaintiff refused to receive the slave, when thus tendered back to him, and soon afterwards brought suit against the defendant on the note given for the purchase-money; that the defendant defended the action, "on the ground that there had been a breach of said warranty, and a rescission of said contract by the said tender"; that the jury found the issue joined on this defense in favor of the defendant, and judgment was thereupon rendered in his favor; that the plaintiff shortly afterwards demanded the slave of the defendant, who gave her up to him. "The evidence tended to show, also, that before the said tender, the defendant worked said slave, and tried to make her work in his plantation up to the time of the tender; that after the said tender and refusal, the defend-

ant carried the slave back to his plantation, and put her in the possession of his overseer, with his other slaves, and told the overseer to let her work or not, just as she pleased; that the overseer obeyed this order, and that the slave worked in the plantation, with the other slaves, up to the time of her delivery to the plaintiff, doing, however, but very little work—about equal to a half hand. The plaintiff also proved the value of the slave's hire, from the time of the sale to the time when he received her back as aforesaid."

"This being all the evidence, the court charged the jury, 'that if they believed from the evidence, that after the tender by the defendant, and before the delivery to the plaintiff, the slave worked in the defendant's plantation, and that her labor was of any value, over and above the expense of keeping her, then the plaintiff was entitled to recover, in this action, what was equitable and just'; also, 'that if the plaintiff was entitled to recover, under the law as above laid down, he might recover as damages the hire of the slave from the time of the sale up to the time when he received her back.' The defendant excepted to each of these charges, and then requested the court to instruct the jury, 'that if they believed from the evidence that the defendant, after the tender of the slave to the plaintiff, placed her back again on his plantation, and told his overseer to let her work or not just as she pleased, and that the overseer did so, and the slave then worked in this way up to the time when she was delivered to the plaintiff, then the plaintiff could not recover'; also, 'that if they found for the plaintiff, they could not, in assessing his damages, give him by way of damages the hire of the slave from the time of the sale to the tender.' These charges the court refused to give, and to the refusal of each the defendant excepted."

The errors now assigned are, the charges given, and the refusal of the charges asked.

D. W. BAINE, for the appellant.

ALEX. WHITE, *contra*.

R. W. WALKER, J.—The case seems to have been treated in the court below, (and it has been so argued here,) as if the contract was in fact rescinded by Rand's offer to return, and Oxford's refusal to receive the slave. Without inquiring or deciding whether such a result is effected, when the tender which is rejected by the seller is based upon a mere breach of warranty, unmixed with fraud, we will consider the case in the aspect in which it has been presented to us.

When the purchaser of a chattel, for a sufficient reason, makes a tender of the property to the seller, with a view to rescission, and the seller refuses to receive it, the purchaser may abandon the property, but he is not bound to do so. He may, if he choose, retain the possession; and in that event, he is considered merely the bailee of the seller, and that relation becomes at once the rule and measure of his rights and responsibilities.—*Dill v. Camp*, 22 Ala. 249; *Des Arts v. Leggett*, 2 Smith's (N. Y.) R. 582; *Bennett v. Fail*, 26 Ala. 610.

It would be the establishment of a hard rule, to hold that, in order to enable the purchaser to insist that the contract and his liability on it are at an end, he must, in case the vendor refuses to accept the property when tendered, actually abandon the possession. That, in many cases, would expose the property to waste and destruction; and if the purchaser should happen to make an insufficient tender, or if he should be unable to prove the facts which justified the rescission, he would still remain liable on the contract, while the property might be lost or destroyed. But a purchaser, who, after the vendor's refusal to accept the property, elects to retain the possession, must not use or employ the property in any manner inconsistent with the vendor's rights, or with the nature of the bailment which in such cases arises by implication of law.—Authorities *supra*. The bailment thus created would seem to belong to the class denominated in the books *depositum*.—See *Farrow v. Bragg*, 30 Ala. 268. In reference to depositaries, it is said—and this is obviously true—that the extent to which they are authorized to use the property depends materially on its nature. If the



subject-matter of the bailment be a living animal, such as a hound or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise. In like manner, the bailee may milk a cow left in his possession, or use the books of a friend deposited in his library.—Addison on Contr. 527; Edwards on Bailments, 89; Story on Bailments, §§ 89-90.

Now we must be presumed to know that moderate labor is not only promotive of the health of a slave, but essential to the preservation of that wholesome discipline, on which his value so materially depends. It is impossible to conceive that, in a case like the one we are considering, the bailee exceeds his authority, if he barely permits the slave to work when he chooses, and accepts the benefit of his occasional and unforced labor. The ruling of the court below involves the proposition, that the bailee is guilty of a conversion unless he compels the slave to be idle. What is a conversion? This court has answered this question, by deciding that, to constitute it, "there must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it, or an appropriation of it by the defendant to his own use; in disregard or defiance of the owner's rights." *Conner & Johnson v. Allen*, at the last term. In another case, it was defined as "any intermeddling with, or dominion over the property, subversive of the dominion of the true owner, or of the nature of the bailment, if it be bailed."—*Freeman v. Scurlock*, 27 Ala. 413.

When, on Oxford's refusal to receive the slave, Rand carried her back to his plantation, and allowed her to work at her pleasure with his other hands, this was not an unlawful interference with the dominion of the owner, nor inconsistent with the nature of the bailment; and it cannot, therefore, be deemed a conversion.—*Kennett v. Robinson*, 2 J. J. Marsh. 84; *Conner & Johnson v. Allen*, at last term; *Fouldes v. Willoughby*, 8 M. & W. 549; *Hoover v. Alexander*, 1 Bailey, 510.

It will be observed, that we have confined our inquiries

to the question, whether the facts supposed would establish a conversion, and a consequent liability in trover. It may often happen, that the value of the use which such a bailee would be authorized to make of the property, without being guilty of a conversion, would exceed the expenses incident to the custody of the property. Whether in such a case the bailee would be liable in any form of action to the owner for this excess, is a question which we have not decided, and on which we intimate no opinion. See Edwards on Bailments, 89-90; Addison on Contr. 530.

The rulings of the court below were in conflict with the views we have expressed.

The judgment is reversed, and the cause remanded.

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### McADAMS vs. BEARD & HENDERSON.

[TRIAL OF RIGHT OF PROPERTY IN SLAVES.]

1. *Commencement of action.*—The commencement of a statutory claim suit is not the issue of the execution, nor its levy, but the making of the affidavit and the giving of the bond by the claimant.
2. *Security for costs.*—A trial of the right of property is not within either the letter or the spirit of section 2396 of the Code, which requires security for the costs in actions commenced by or for the use of a non-resident.
3. *Admissibility of declarations as part of res gestæ.*—Where the claimant derives title to the slave in controversy under a purchase from the defendant in execution, their declarations respecting the contract, whether made before or after its consummation, but not constituting a part of the *res gestæ*, are not competent evidence for the claimant.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS was a trial of the right of property in two slaves, between Beard & Henderson, plaintiffs in execution against David Edwards, and James F. McAdams, as claimants. The levy was made on the 3d December,

1855; and the claimant made the statutory affidavit, and gave the required bond, on the 7th January, 1856. After several continuances by both parties, the case was finally called for trial at the fall term, 1858; and the claimant then moved to dismiss the levy, on the ground that the plaintiffs were non-residents, and had failed to give security for the costs. The court allowed the plaintiffs to give security at that time, and then overruled the claimant's motion; to which action he excepted.

On the trial, the plaintiff offered in evidence the deposition of his father, James McAdams, who, in answer to the 5th direct interrogatory, testified as follows: "I did not hear the trade made; *but, on the day it was made, the said David Edwards and James F. McAdams both told me they had made a trade for some negroes, to-wit,*" (describing the slaves in controversy;) "*which slaves, as they told me, the said James F. had bought of the said Edwards for \$1,300.*" This was on the 5th day of February, 1855. A note was executed by the said James F. to the said Edwards for the purchase-money, and bills of sale were given by Edwards to the said James F.; but no money was paid down, that I know of, or according to their statements to me in the conversation alluded to." On the plaintiff's motion, the court suppressed the italicized portion of this answer; and the claimant excepted.

In answer to the 9th direct interrogatory, the witness testified as follows: "I did not see any money paid upon said note; but, on the 30th August, 1855, the said James F. showed me the note, and *remarked that he had made a rise sufficient to take up that note to Edwards, and had just made the last payment upon it.*" In answer to the 2d cross-interrogatory: "I was not a witness to the contract, and was not present, except in the manner above stated, being in another room. *I heard both of the parties speak of making such a contract, some days before it was said to be made, and in the morning of that day; and they both told me that day, after I saw them in the room together, talking and writing as above stated, that they had traded;* and I afterwards saw the bills of sale, as above answered, in the possession of the said James F.; and then, on the 30th August, 1855, the



note mentioned. This is the manner in which I derived my information in regard to the sale. I did not see any money paid by said James F. to Edwards. *Said contract took place, according to the information I got from the parties, on the day I saw them talking together and writing in one room of my house.* I do not recollect any person that was present, unless some of my family were present in passing about the house." And in answer to the 4th cross-interrogatory: "They did not show me the papers on that day, and I did not know, at the time I saw them writing, what papers they were writing; though *I heard them speak of the trade that was on hand about the negroes, in the morning before I saw them engaged in writing,* and some days previous." The italicized portions of each of these answers were suppressed by the court, on motion of the plaintiffs; to which exceptions were reserved by the claimant.

The errors assigned embrace all the rulings of the court below to which exceptions were reserved.

J. F. CLEMENTS, and R. M. WILLIAMSON, for appellant.  
BAINE & NESMITH, *contra*.

A. J. WALKER, C. J.—It is certainly indisputable that a trial of the right of property, under our statute, is an action or suit, in which the plaintiff in execution is deemed the actor, and the claimant the defendant.—*Jacott v. Hobson*, 11 Ala. 434; *P. & M. Bank of Mobile v. Borland*, 5 Ala. 531. Being an *action*, it clearly falls within the purview of the statute exacting security for costs from non-resident plaintiffs before commencing their actions, unless something else than the mere fact of its being an action is requisite to make the statute applicable to the case.

The statute is section 2396 of the Code, and its language is: "All actions commenced by or for the use of a non-resident of this State must be dismissed, on motion, by the court, unless security for the costs be endorsed on the complaint, or lodged with the clerk, previous to the issue of the summons; and the costs which have accrued must be taxed against the attorney directing the

summons to issue." If the letter of the law were followed, it would probably include only actions commenced by a summons with the accompanying complaint, and it would not have included trials of the right of property. But a more latitudinous construction has been put upon it, and that construction is now too well settled to be disturbed. *Ex parte Robbins*, 29 Ala. 71; *Shepherd & Gordon v. Spriggs*, *ib.* 673; *Garrett & Bibb v. Terry*, 31 Ala. 678.

The doctrine of those decisions was established through an equitable construction, which sought the spirit and intention of the legislature, at the sacrifice of the strict letter of the law. There are reasons for not so stretching the statute as to include trials of the right of property, which did not apply in those cases. If it can be shown that trials of the right of property are commenced by the act of another than the plaintiff, and without any antecedent notification to him, it would involve the most gross and palpable injustice, to make the failure to give security for the costs a cause for the dismissal of the suit. It would be equivalent to saying to the plaintiff, By the act of another, without notice to you, you are made a plaintiff in a suit; and yet, because you did not anticipate the commencement of the suit, and give security for costs, your suit must be dismissed. Such a law would be kindred in its spirit to the conduct of the Roman emperor, who ensnared his people by writing his laws in small characters, and hanging them on high pillars. A court searching for an *equitable* construction of a statute, could never give it such an effect.

The trial of the right of property, under our statute, is a proceeding altogether *sui generis*. There is no precedent for it known to us in the English law. Hence, there is much disputation in this case as to the precise point at which the action commences. This court has incidentally observed in argument, without having the question before it, that the execution was the leading process of the action. *Pl. & M. Bank of Mobile v. Borland*, *supra*. This remark was certainly wrong. The issue of the execution cannot be the commencement of a suit. It is not its aim or purpose to inaugurate a suit. In the execution of its

mandate, the sheriff may do that which will become the predicate of a suit in detinue, trover, or trespass, or of a trial of the right of property; but it is not the commencement of any of those actions. It is not known, when the execution issues, that there will be any claim to property levied on; and until the levy, the thing is not done which is the cause of the action. If, therefore, a suit exists from the issue of the execution, we have the absurdity of a suit without a defendant, and in advance of the cause which produces the suit. We would have, too, the equally glaring absurdity of a suit without a pendency in any particular court; for the trial of the right of property is to be had in the county where the levy is made, and the ascertainment of the county, in the circuit court of which the trial is to be had, must, of course, await the levy.

If the execution does not commence the suit, the next inquiry is, whether it is commenced by the levy. In the way of making the levy the date of the commencement of the suit, there are also insuperable obstacles. At the levy, there is no defendant; and a suit would then be without a defendant. If the levy be wrongful, the injured person is not bound to resort to a trial of the right of property. He has his common-law remedies, which he may prefer. The statutory action is, therefore, not even a necessary consequence of the levy.

Indeed, it is too clear to require any argument to demonstrate it, that the action cannot commence before the assertion of the claim, by making the affidavit and giving the bond prescribed; for those acts are indispensable, and without them the action can never be. It is also plain, that the suit commences when the bond and affidavit are given, and not afterwards. Then the parties have done the last act to be performed out of court. The bond and affidavit are transmitted to the proper court, and thereupon an issue is made up. The suit is thus initiated by the bond and affidavit, as it is in ordinary cases by summons and complaint. This is not only shown by the general plan or scheme of the law, but by a consideration of some of its distinct provisions. Upon the execution of the bond, the property taken in execution is



surrendered back into the possession from which it was taken. It cannot be that the law would thus arrest a creditor in the use of process for the collection of the debt, and take away from his reach the property, until he was protected by the actual pendency of the statutory suit, by which the bond might be available to him. Again, it cannot be that the death of the claimant, on the day after the date of the bond and affidavit, would deprive the plaintiff of his right to prosecute the statutory action. Yet that would be the result, unless the suit is commenced with the making of the bond and affidavit; for there could be no revivor against the representatives of one who was dead before the suit was commenced.

On the same point it may be further said, that the language of the statute clearly shows that the claim is interposed when the bond and affidavit are made, and the claim to damages thereby released.—Code, § 2594. It would present a singular inconsistency, if the law should hold that the claimant made his election, and waived his right of suit against the sheriff, before the statutory suit for determining his claim was instituted. This question was indirectly passed upon in *Wiswall v. Glidden*, 4 Ala. 357, and it is inferrible from the opinion that the court regarded the suit as pending from the interposition of the claim, and each party as having the right to ask that it should be docketed.

Upon the reasoning and authorities above adduced, we feel compelled to dissent from the ingenious and elaborate argument for the appellant, and hold, consistently with what has been the uniform practice, that the statutory action is commenced when the bond and affidavit are given, and that subpoenas for witnesses might issue, and depositions be taken before the term of the court next succeeding the interposition of the claim.

From that conclusion it is a necessary sequence, that it is the act of the claimant which gives a commencement to the suit. Indeed, this court said in *Wiswall v. Glidden*, *supra*, that the suit was originated by the act of the claimant, thus deciding the question. Of this act by the claimant the plaintiff is entitled to no notification; and it would

be, as we think we have already shown, a monstrous proposition, that the claimant could, in his absence and without his knowledge, initiate a suit, to which he would stand in the attitude of a party plaintiff, and afterwards obtain a dismissal of the suit because security for costs was not given before the suit was commenced.

[2.] It is true that, under the statute which was in force before the adoption of the Code, it was decided, that the plaintiff, in this form of action, might be required to give security for costs.—*Jacott v. Hobson*, 11 Ala. 434. But that statute was altogether different from the section of the Code upon the same subject. It provided merely that non-resident plaintiffs might be required to give security for costs upon sixty days notice. The principle, that the carrying into the Code a pre-existing statute is a legislative adoption of its previous construction, is, therefore, not in point.

Trials of the right of property are clearly not within the letter of the section of the Code, and to hold it within its equity would, as we think we have shown, have the sanction of neither precedent, reason nor justice. There was no error in the refusal of the court to sustain the motions made, because security for costs was not given before the commencement of the suit.

[3.] The portions of the answer of the witness, James McAdams, to the 5th, 7th and 9th interrogatories, and to the 2d and 4th cross-interrogatories, which were excluded, were mere declarations, properly classed as hearsay, unless, perhaps, the first portion of the excluded part of the answer to the 7th interrogatory should be excepted. But if this last named portion was admissible, we cannot pronounce that the court erred in excluding it, unless it had been offered separately from the illegal evidence with which it is connected, and that was not done.—See the cases collected in *Shepherd's Digest*, 596, § 170. The part of the answer to the 5th interrogatory, which was excluded, did not state a conversation which was a part of the *res gestæ*. It neither accompanied, nor is shown to have been so near the transaction as to constitute a part of it. It could only be a part of the *res gestæ* upon the

supposition, that everything said by the parties in reference to it afterwards on the same day must, of necessity, be a part of the transaction.

In the two cases of *Olds v. Powell*, 9 Ala. 861, and *Gillespie v. Burleson*, 28 Ala. 551, the question before the court was, whether a gift or loan of a slave was made by a father-in-law to his son-in-law. There was no question of fraud. In those cases, and in reference to that question, it was decided, that antecedent declarations of the donor, made when the gift was under consideration and discussion by the donor, and made in reference to it, and in contemplation of it, and explanatory of the donor's intention, were admissible. This principle has no application, which can be perceived, to the question of the admissibility of the part of the answer (which was excluded) to the 4th cross-interrogatory. That answer was simply that the witness had heard the claimant and defendant in execution speak of a trade which was on hand for the transfer of the negroes in controversy, on the morning before they were transferred by the latter to the former. This evidence was clearly mere hearsay, and does not fall, as counsel suppose, within the principle above stated.

The judgment of the court below is affirmed.

STONE, J., having been of counsel, did not sit in this case.

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## BURNS vs. MAYOR, &c., OF MOBILE.

[PROCEEDING FOR VIOLATION OF MUNICIPAL ORDINANCE.]

1. *Demurrer to complaint.*—A demurrer, which specifies the portion of the complaint to which it is interposed, but does not state or point out any ground of objection to it, is not a compliance with the statute, (Code, § 2253,) and should be overruled.



APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

The appellant was prosecuted, before the mayor of the city of Mobile, for the violation of a municipal ordinance, and was fined \$50. She removed the case, by appeal, into the circuit court, where a complaint was filed, in these words: "The plaintiff claims of the defendant fifty dollars penalty, for that whereas, on the 17th day of March, 1858, the said defendant did, or permit some other person to sell, furnish or give away, spirituous, or intoxicating, or malt liquors, to a slave, in the corporate limits of said city, named John, the property of W. Weeks, without the written permission of said slave's owner, master, or overseer; contrary to the provisions of, and for breach of an ordinance, passed by said plaintiff, entitled 'An ordinance respecting slaves.' Section 14 of said ordinance [is] as follows: 'That if any tavern-keeper, grog-shop, or coffee-house keeper, or any other person, shall sell, furnish, or give away, or permit any other person to sell, furnish, or give away, any spirituous, or intoxicating, or malt liquors, to any slave or slaves, without the written consent of the owner, master, or agent, he, she, or they, so offending, shall, for every offense, incur a fine of fifty dollars.'" To this complaint the defendant filed a demurrer in these words: "The defendant demurs to the complaint, as follows: to the words, '*did permit some other person to sell, furnish, or give away, spirituous, or intoxicating, or malt,*' and prays judgment, &c." The court overruled the demurrer; and this ruling, with other matters, is now assigned as error.

W. C. EASTON, for appellant.

JNO. HALL, *contra*.

STONE, J.—The Code (§ 2253) declares, that, on demurrer, "no objection can be taken or allowed, which is not distinctly stated in the demurrer." The demurrer in this case does state the part or portion of the complaint to which it is interposed; but it does not state the *objection* to the complaint, or part of the complaint.

Suppose a demurrer were filed to an entire complaint, or to an entire count in a complaint, and the demurrer should state no other objection than that it was interposed to the whole complaint, or to a particular count in the complaint; all would concede, that this would not be a compliance with the statute. It would fail to state distinctly the objection relied on. The present demurrer is obnoxious to the same criticism. To comply with the statute, it should point out and specify the defect or defects on which the party demurring asks the judgment of the court.

The charge asked should not have been given. The ordinance imposed a penalty on all persons who sell, furnish, or give away, spirituous liquors, &c., to a slave, &c. The charge claimed an acquittal on the single ground, that the slaves were sent into one house, while the defendant lived at the time in another. Mrs. Burns may have had her residence *on the corner of Union and Cedar streets*, and still may herself have sold, furnished or given, or, with her permission and authority, another may have sold, furnished or given liquor to the slaves, *in a house which stood on the corner of Madison and Cedar streets*.

No charge was asked on the sufficiency of the evidence, or its tendencies. Hence, we need not, and do not consider whether there was sufficient evidence to justify a conviction. That was, under proper instructions, a question for the jury; and we have no authority for supposing the question was not fairly presented for their deliberation.

Judgment of the circuit court affirmed.

## JAMES vs. HENDREE'S ADM'R.

[ACTION ON OPEN ACCOUNT—PLEA OF SET-OFF.]

1. *Change of public road.*—Under the provisions of the Code, (§§ 1131, 1176.) a public road can only be lawfully changed by an order of the court of county commissioners, although a person who straightens such road through enclosures, or renders it more convenient for the public, is not liable to a criminal prosecution for a misdemeanor.
2. *Validity of contract in contravention of public policy.*—A contract by which one party, having illegally changed and obstructed a public road, agrees to indemnify the other, who was liable to work on the road, against all costs and damages which he might sustain in a prosecution as a defaulter, if he would refuse to work on the road, is in contravention of public policy, and therefore void.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by R. C. Torrey, as the administrator of George R. Hendree, deceased, against Lorenzo James, and was commenced in a justice's court. After the removal of the cause into the circuit court, the defendant there pleaded as a set-off, that the plaintiff's intestate was indebted to him in the sum of \$60.25; "which debt," the plea alleged, "grew out of the following circumstances: The defendant's overseer was warned to send his (defendant's) hands to work upon a road which run through the lands of plaintiff's intestate, and which said intestate had previously stopped up so as to impede travel, and opened another road contiguous thereto, which, he claimed, shortened the distance, and was more convenient to the public. Said intestate requested defendant not to send his hands to work upon the road which he had obstructed, and agreed, in case he refused to do so, to indemnify him against all costs, damages and expenses, which he might incur and sustain in the event of his being returned as a defaulter by the overseer of the road; and defendant agreed with said intestate that he would not send his hands to work upon said road,—respecting which road



and the new one opened by said intestate, a controversy was then going on between said intestate and the overseer of the public road, as to which was the proper road for said overseer to put in repair. In pursuance of said agreement, defendant refused to send his hands to work upon said obstructed road ; and, in consequence thereof, defendant was returned as a defaulter, and was fined in the sum of \$36. Defendant took an appeal from the decision of the justice of the peace, fining him as aforesaid, to the circuit court of said county ; and pending said appeal, to-wit, at the January term, 1856, the costs of the term were imposed on the defendant, amounting to \$60.25, which he accordingly paid on the 15th April, 1857. The said agreement between defendant and said intestate was reduced to writing, and signed and sealed by said intestate, on the 1st March, 1856. Defendant has complied in every respect with his said contract, as well as regards the defense of said suit against him as a defaulter. The road which, as above stated, was obstructed and changed by said intestate, has never been used as a public road since that time ; but the new road opened by said intestate, as above stated, has ever since been recognized and used as a public road, and adopted in place of said first named road. Said new road was more convenient and beneficial to said intestate than the one which has been abandoned. Said old road ran through one of said intestate's fields, which, by the change of the road as aforesaid, he was subsequently enabled to take into cultivation, and throw into one large field under one fence. Said intestate had a direct interest in the removal of said road from its old location, and also in the establishment of the new road as the proper one to be repaired and worked by the overseer ; and the defendant's success in the suit pending in the circuit court, for the costs, damages and expenses whereof said intestate had agreed to indemnify him, would enure to said intestate's own benefit. Wherefore said defendant prays that said sum, with interest, may be set off," &c.

The plaintiff craved oyer of the written contract referred to, and demurred to the plea, on the following grounds :

1st, "because said contract was made without any good, sufficient or legal consideration;" 2d, because said intestate was a stranger to the suit against said defendant, and had no interest therein, and said contract was executed for the purpose of maintaining and promoting said suit;" 3d, "because said contract was made by said intestate, if made at all, for the purpose of encouraging, promoting and maintaining suits and proceedings at law in which he had no interest, and to which he would be a stranger;" and, 4th, "because said plea does not show that the result of the suit against said defendant would have any effect in determining the question whether the old or the new was the proper road." The written contract, as set out on oyer, was signed only by the intestate, and was in these words: "Whereas a suit is now pending in the circuit court of Clarke county, Alabama, at the instance of said county, against Lorenzo James, for refusing to work on the road between Rocky Mount and Gainestown; now, therefore, I voluntarily pledge myself to the said James to pay all the costs, damages, lawyers'-fees, &c., incurred in the defense of said suit; provided that said James shall use all due and customary diligence, attention and vigor, in all things necessary to make a good defense, by personal attendance, proper effort to secure the attendance of witnesses, honest effort to impress the public mind fairly, and by each and every other act that may be of use in constituting a fair, honorable and good defense; the character of the defense on the part of said James not to be judged by me, but by the counsel for the defense. In testimony whereof," &c.

The court sustained the demurrer to the plea, and its ruling is here assigned as error.

O. S. JEWETT, for the appellant.

R. C. TORREY, *contra*.

R. W. WALKER, J.—Section 1131 of the Code provides, that "no public road can be established, changed or discontinued, except on application to the court of county commissioners." By section 1176 it is provided, that it

is a misdemeanor "to change a public road, except by order of the court of county commissioners, \* \* unless it straightens the same through enclosures, or renders it more convenient for the public." There is no conflict between these two sections. The last was not intended to prescribe a second mode in which a public road could be legally changed, but simply to exempt from criminal prosecution those persons who, while changing a public road without proper authority, yet make the change in such a manner as to straighten the road through enclosures, or render it more convenient for the public. A public road, regularly established, can only be lawfully changed by order of the court of county commissioners. Hence, upon the facts stated in the plea, the original road had not, at the time the defendant's hands were warned by the overseer to work on it, ceased to be the public road. It had not been changed in the only mode in which an authoritative change could be made; and consequently it was the duty of James to send his hands to work it, in obedience to the summons of the overseer.

[2.] The contract alleged in the plea was made to prevent his performance of a duty cast upon him by law, and in the performance of which the State had an interest. Such a contract is clearly in contravention of public policy, and therefore void. The demurrer was properly sustained.

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## MOORE vs. FLEMING.

[ACTION FOR BREACH OF SPECIAL CONTRACT.]

1. *Construction of special contract.*—Under a written contract, by which defendant agreed to deliver to plaintiff two notes on third persons, or, in the event of his failure to do so, "*to make satisfaction within four weeks,*" the alternative stipulation binds the defendant to make such compensation as the law appoints for his failure to deliver the notes.



2. *Measure of damages, and burden of proof.*—In an action for the breach of such a contract, the measure of damages is the value of the notes on the supposition that they were genuine; and the *onus* of proving their value is on the plaintiff.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by John Fleming, against Israel Moore, and was founded on the defendant's written contract, dated the 26th September, 1850, a copy of which is set out in the opinion of the court. The only plea was the general issue, with leave to give any special matter in evidence. On the trial, as appears from the bill of exceptions, the plaintiff proved the execution of the contract declared on, and then introduced one Wiley White as a witness, "who testified, that he knew Robert Smedley; that said Smedley, in the year 1851, had a horse, and made a crop on a piece of land on which he was living; but that he did not know to whom said land belonged, nor whether any money could have been made out of said Smedley." "The defendant then introduced a witness, and exhibited to him two notes corresponding with those described in the contract declared on; and said witness testified, that these notes were sent to him by the defendant in the fall of 1850, and were afterwards offered by him to the plaintiff, who refused to accept them."

"This being all the evidence, the court charged the jury, 'that if they believed the evidence, they must find for the plaintiff, for the amount of the notes mentioned in the instrument sued on, with interest from the time when they were to have been sent or delivered to the plaintiff.' To this charge the defendant excepted, and then asked the court to instruct the jury, 'that if they believed all the evidence, they must find for the defendant'; also, 'that if they believed all the evidence, they could not find more than nominal damages for the plaintiff.' The court refused each of these charges, and the defendant excepted."

The errors now assigned are, the charge given by the court, and the refusal of the charges asked.

C. D. HUDSON, for the appellant.

RICHARDS & FALKNER, *contra*.

A. J. WALKER, C. J.—The contract upon which this suit is predicated is in the following words: "I promise to send John Fleming two notes of hand, one on Robert Smedley for \$25, and one on Wiley E. Reaves for \$35, or make satisfaction, if I fail, within four weeks." This is not a contract to pay so much money, to be discharged, or which may be discharged, with some specified article; nor is it a contract to pay some particular chattel or so much money. Such contracts are regarded as providing an alternative privilege for the promisor to pay in the specified article; and if he does not avail himself of that privilege, his obligation to pay in money becomes absolute.—*Wolfe v. Parham*, 18 Ala. 441; *Love v. Simmons*, 10 *ib.* 113; *Plowman v. Riddle*, 7 *ib.* 775. The contract was to deliver two specified notes, and to make satisfaction, in the event of his failure to do so, in four weeks. We construe this contract to mean, that the defendant should make such "satisfaction," or compensation, as the law appoints for his failure to deliver the two notes. The contract would have been substantially the same, if it had been simply a promise to send or deliver the two notes in four weeks. The measure of damages, or "satisfaction," due for the breach of such a contract, was obviously the value of the two designated notes. It could not be the amount mentioned in the face of these notes, without regard to their value; for this court has decided, that even a promise to pay in solvent notes to a certain amount is not equivalent to a promise to pay so much in dollars. *Williams v. Sims*, 22 Ala. 512. The same decision has been made in reference to promises to pay in bank-notes. *Jolly v. Walker*, 26 Ala. 690; *Wilson v. Jones*, 8 *ib.* 536; *Carter v. Penn*, 4 *ib.* 140. Upon a failure on the part of the defendant to deliver the notes, looking at the contract alone, we decide, that the plaintiff had a right to recover their value, upon the supposition that they were genuine; and the *onus* of proof as to their value was upon him, because that was as essential an ingredient of his case, as

though the promise had been to deliver any other chattel.

The plaintiff introduced some proof, touching the question of the value of one of the notes; and the court was, therefore, correct in refusing to charge the jury, at the defendant's instance, that the plaintiff could not recover more than nominal damages. It is equally clear that the court erred, in charging the jury that, if they believed the evidence, they must find for the plaintiff the amount of the two notes, with interest. Although there was some testimony as to the value of one of the notes, yet it was not such as to authorize the court to assume its sufficiency to justify the finding for the plaintiff, even of the amount of that note, much less of both the notes. The charge, that the jury, upon the evidence, should find the amount of both the notes with interest, could not be correct, unless the testimony was such as to show conclusively that the notes were of value equal to the number of dollars mentioned in them.

The judgment of the court below is reversed, and the cause remanded.

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### PUNCH & DUGGAN *vs.* WALKE AND WIFE.

[ACTION AGAINST HUSBAND AND WIFE, ON PROMISSORY NOTE AND OPEN ACCOUNT.]

1. *Form and sufficiency of complaint.*—In an action against husband and wife seeking to charge the wife's separate estate with "articles of comfort and support of the household," (Code, § 1987,) the complaint must aver that the articles furnished were such as the husband would be liable for at common law, or state facts from which that inference can be drawn.
2. *Amendment of complaint.*—The refusal of the court to allow an amendment of the complaint, by the addition of a count which would not support a verdict and judgment in favor of the plaintiff, is not a matter of which he can complain on error.

APPEAL from the Circuit Court of Dallas.

Heard before the Hon. NAT. COOK.



THIS action was brought by the appellants, as partners, against Jno. M. Walke and Clementine M. Walke, his wife; the complaint, as set out in the record, being in these words: "The plaintiffs claim of the defendants seventy-four dollars, due by promissory note made by them on the 1st June, 1857, and payable one day after date, with interest thereon. And the plaintiffs claim the further sum of seventy-four dollars, with interest thereon from the 1st June, 1857, due for articles of comfort and supply of the household, suitable to the degree and condition in life of the family; and the plaintiffs aver, that said Clementine M. Walke is a married woman, and is possessed of a separate estate under the Code, and that she is the wife of said John M. Walke." When the case was called for trial, as the bill of exceptions shows, the plaintiffs asked leave to amend their complaint, by the addition of a count which, as set out in the bill of exceptions, was precisely the same as the second count of the complaint above copied. The court refused to allow the amendment, and the plaintiffs excepted. "The plea of coverture having been interposed in behalf of Mrs. Walke, and it being admitted that she was a married woman, the court instructed the jury that they must find for her, and proposed to give judgment for the plaintiffs against the said John M. Walke. This the plaintiffs declined, and took a nonsuit." The refusal of the proposed amendment, and the charge of the court to the jury, are the matters now assigned as error.

J. D. F. WILLIAMS, for the appellants.

D. S. TROY, *contra*.

STONE, J.—The exceptions to the action of the circuit court all relate to its refusal to permit certain amendments of the complaint. The complaint copied in the record contains two counts, the second of which is a literal copy of the one mentioned in the bill of exceptions as proposed and rejected. Under a severe criticism, we might presume the amendment was rejected, because it added nothing to the sufficiency of the complaint already

on file. We suppose, however, that this is an error of the clerk in copying; and that the said second count never was filed, but is in fact the proposed amendment. What we would decide in this connection, if it were necessary to a decision of this case, we do not now announce.

Without adverting to any other defect in the amendment which was offered to be filed to the complaint in this case, it is evidently insufficient to justify a recovery against the separate estate of the wife, under section 1987 of the Code. It fails to aver that the articles purchased were such as the husband would be responsible for in an action at common law, or any other facts from which that inference can be drawn. Hence, if the amendment had been allowed, and a judgment had been rendered against both defendants, that judgment would have been reversed on error.—*Durden and Wife v. McWilliams*, 31 Ala. 438; *Henry v. Hickman*, 22 Ala. 685; *Cunningham v. Fontaine*, 25 Ala. 644; *Gibson v. Marquis*, 29 Ala. 668; *Ravesies v. Stoddart and Wife*, 32 Ala. 599.

The simple question, then, which this record presents, is the refusal of the circuit court to allow an amendment, which, if allowed, would not have supported a verdict and judgment. This cannot be regarded as the *amendment* of an imperfection or defect.—Code, § 2403. If, however, it be an error, it is without injury to the plaintiffs.—*Shep. Digest*, 568, § 82.

Judgment of the circuit court affirmed.

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## SCREWS vs. UPSHAW.

### [CONDITIONAL GRANT OF NEW TRIAL.]

1. *What constitutes payment of costs in performance of condition.*—Under an order granting a new trial, “on the sole condition that the plaintiff pay all costs in four months,” nothing but an actual payment in money, within the prescribed time, can be deemed a compliance with the condition, unless the defendant consents to receive something else in satisfaction of the costs.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

IN this case, at the spring term, 1857, after the rendition of a judgment on verdict for the defendant, on motion for a new trial, the court made an order in these words: "It is considered that said motion be granted, on the sole condition that the plaintiff pay all costs in four months." At the next ensuing term, the defendant moved the court to strike the case from the trial docket, on these two grounds: 1st, because the order granting a new trial was void; and, 2d, because the condition annexed to the order had not been complied with. On the hearing of this motion, as appears from the bill of exceptions, the following evidence was adduced:

"The defendant introduced one McNab as a witness, who was the clerk of said court, and who testified, that John W. Clark, the sheriff of the county, came to him in May, 1857, and told him that he had been requested by one Thomas Rivers, who was interested in the subject-matter of the suit, to pay the costs which had to be paid in order to get a new trial in this case, and told witness to charge the costs to him (said Clark), and that he would allow him (witness) credit for the amount on settlement; that he (witness) was indebted to said Clark, for costs collected for him as such sheriff, and also an individual debt for goods and groceries; that said Clark, as sheriff, had also collected costs for him as clerk, to be accounted for on settlement; that it was their custom to keep running accounts against each other for costs; that he agreed to charge said costs to said Clark, and did charge them to him, to be placed to his credit on said account for goods, groceries and costs; that no money was in fact paid to him for said costs, or any part thereof, either by said Clark or any one else, within said four months, or at any other time; that he had never received any funds from any person, to be applied to the payment of said costs, or any part thereof; that the order for the payment of costs had never been complied with, except as above stated; that at the time of said arrangement and agreement with



Clark, he (witness) gave said Clark a receipt, dated the 20th May, 1857, which acknowledged payment by the plaintiff of all the costs in this case, and which receipt was genuine; that he had always held himself in readiness to pay the witnesses in the case, whenever they presented their certificates; and that, at the fall term, 1857, he had paid most, if not all, of the witness-fees due in respect of said new trial. The defendant also introduced a witness who testified, that he had attended and been examined as a witness in this case, had proved his attendance, and received his certificate; that at the fall term, 1857, he presented his said certificate for payment to George W. Coleman, the general deputy of said McNab as clerk, and was informed by him that the costs had not been paid, and that they were to be paid by said Thomas Rivers; that afterwards, on the same day, he presented his said certificate to plaintiff, who then paid him the money due on it.

“The defendant resting his said motion on the foregoing proof, the plaintiff then introduced and examined as witnesses the said Clark and Coleman, sheriff and deputy-clerk as aforesaid, both of whom testified, that said Clark, within four months from said spring term, 1857, and after said arrangement between him and McNab, upon the idea occurring to him that said arrangement might not stand, went into the clerk's office, and finding said Coleman there, who transacts the general business of the office, told him that, if said arrangement with McNab about the payment of said costs would not do, he was willing then to pay the money; that said Coleman replied, ‘never mind, it would do at the next term of the court;’ and that Clark tendered in money and made no offer, except as above stated. Said Clark further testified, that he had no funds in hand at the time of said arrangement with McNab, or at the time of said offer to Coleman, belonging either to plaintiff or said Rivers; that at the time of said Rivers' request to him to pay the costs, he was the administrator, by virtue of his office as sheriff, of the estate of one Cobb, against which said Rivers had an unpaid claim for about \$75; but that he had no reference

to said claim in undertaking to arrange for the payment of said costs as above stated. The amount of the costs to be paid was \$56.

"The foregoing being all the evidence, the court held that the condition had not been complied with by the payment of the costs within the time limited, and ordered the cause to be struck from the docket; to which the plaintiff excepted," and which he now assigns as error.

L. L. CATO, for the appellant.

PUGH & BULLOCK, *contra*.

R. W. WALKER, J.—The effect of the order made by the court, upon the motion for a new trial, was, that the judgment in favor of Upshaw was to stand, unless Screws should pay all the costs in four months.

By virtue of his office, the clerk was authorized to receive the costs, the payment of which was the condition upon which the new trial was granted. But he had not the right to accept of anything but money in payment. The negotiation between the sheriff and the clerk, however it might bind the latter, cannot affect the plaintiff in the judgment, who in no wise assented to it. Without Upshaw's consent to receive something else in satisfaction of the costs, nothing but an actual payment in money, within the time prescribed, could be deemed a compliance with the condition imposed by the court. Williams v. Charles, 7 Ala. 203; Cook v. Bloodgood, 7 Ala. 687; Bobo v. Johnson, 3 S. & P. 385; Bank of Orange Co. v. Wakeman, 1 Cowen, 46; Keller v. Scott, 2 Sm. & M. 81.

The offer of the sheriff to pay the costs, when he had no money with which to make the payment, and the reply of the deputy clerk waiving payment at the time, cannot, as against the plaintiff in the judgment, be deemed equivalent to actual payment. How it might be, if Screws had, within the time prescribed, made an actual tender of the money to the clerk, and the latter had *refused* to receive it, we need not inquire. No such proof was made in this case.

The judgment is affirmed.

## RELFE vs. RELFE.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Vendor's lien not barred by statute of limitations.*—A vendor's lien for the unpaid purchase-money of land, under a parol executory contract of sale, is not lost or destroyed because the statute of limitations has effected a bar against an action at law to recover the purchase-money.
2. *Nor affected by staleness of demand.*—A bill in equity, to enforce a vendor's lien for the unpaid purchase-money of land, cannot be considered a stale demand, when filed within less than twenty years after the sale.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed on 6th March, 1858, by Montgomery S. Relfe, against his brother, Blakely J. Relfe, and the personal representatives and heirs-at-law of his deceased brother, Decatur J. Relfe. It alleged, that the complainant, in 1846, sold to his said two brothers, by verbal contract, his undivided one-third interest in a tract of land which belonged to the three jointly; that by the terms of said contract, possession of the land was to be delivered on the 1st January, 1846, and the purchase-money was to be paid in three equal annual installments, on the 1st January, 1847, 1848, and 1849, with interest from the 1st January, 1846, said Blakely and Decatur each to pay one half; that possession was delivered pursuant to the terms of the contract; that the land was afterwards divided, by agreement, between the said Decatur and Blakely, and each went into possession of one-half; that the said Blakely paid one-half of the purchase-money, but the said Decatur J. Relfe died "about the last of the year 1853, having never paid any portion of the purchase-money due from him;" that the complainant "indulged the said Decatur in the payment of said money, because he was not particularly in need of it, and did not desire to press him, being his brother;" and that said Decatur cultivated said land up to the time of



his death, and removed certain improvements, which were on the land when he bought it, to some other lands belonging to him. The prayer of the bill was, that the unpaid purchase-money might be ordered to be paid by the executor out of the personal assets which might come to his hands, if sufficient; that if the personal estate should prove insufficient, "the said real estate be then sold to pay the same, and the vendor's lien be enforced;" and the general prayer, for other and further relief, was added.

The defendants demurred to the bill, on the following specified grounds: "1st, because it contains no equity; 2d, because complainant's remedy is barred by lapse of time and the staleness of his demand; 3d, because his right to relief is barred by the statute of limitations of ten years; and, 4th, because his right is barred by the statute of limitations of six years." The chancellor sustained the demurrer, and dismissed the bill; and his decree is now assigned as error.

J. F. CLEMENTS, for the appellant.—1. A vendor's lien for the unpaid purchase-money of land, under an executory contract of sale, has all the incidents of a mortgage. 1 Hilliard on Mortgages, 613; *Magruder v. Peters*, 11 Gill & John. 229; *Lingan v. Henderson*, 1 Bland, 282.

2. A limitation which is sufficient to bar the personal claim of the vendor, will not bar his lien for the purchase-money.—*Driver v. Hudspeth*, 16 Ala. 384; *Lingan v. Henderson*, 1 Bland, 282; *Magruder v. Peters*, 11 Gill & John. 229; 14 Ark. 628; *Belknap v. Gleason*, 11 Conn. 160.

3. The complainant's right to relief was not barred by lapse of time, or the staleness of his demand. Lapse of time, to constitute a bar in equity, is usually put at twenty years.—*Byrd v. McDaniel*, 33 Ala. 18. When the bill was filed, the statute of ten years had not barred a recovery of the land by action at law, if the vendor had chosen to resort to that remedy.—*Seabury v. Stewart & Easton*, 22 Ala. 207; *Boyd v. Beck*, 29 Ala. 703; 4 Cranch, 415; 6 J. J. Marsh. 158; 1 Harper's Ch. 164.

Moreover, delay is always susceptible of explanation, and is here sufficiently explained.—Angell on Limitation, 562, note; 1 Vesey, 51; 10 Leigh, 284; 4 Munf. 332; 1 Litt. 53.

BAINES & NESMITH, *contra*.—1. Under the facts alleged in the bill, an action at law to recover the purchase-money could have been maintained more than six years before the filing of the bill.—Gillespie v. Battle, 15 Ala. 276. When the remedies at law and in equity are concurrent, the statute of limitations applies alike in both forums. Maury v. Mason, 8 Porter, 211; Sims v. Canfield, 2 Ala. 555; Wood v. Wood, 3 Ala. 756.

2. Although a vendor's lien is said to have all the incidents of a mortgage, there is yet a clearly marked distinction between it and a mortgage. A mortgage is a conveyance by the party, while the lien is only a security built up by the law for the protection of the debt. This distinction is precisely the difference between express and implied trusts; and an implied trust, as to money or personal property, is barred in equity in six years.—Martin v. Br. Bank at Decatur, 31 Ala. 115; Tarleton v. Goldthwaite, 23 Ala. 346. The vendor's lien is nothing more than the assistance which equity gives to aid a legal remedy for the debt. It springs up from the debt, not so much to give a new right, as a new remedy; and when the right to recover the debt is gone, the lien has nothing to support it. This distinction is taken, and the above propositions clearly maintained, in the case of Trotter v. Erwin, 27 Miss. 776; and in Borst v. Corey, 1 Smith's R. (15 N. Y.) 507. See, also, Littlejohn v. Gordon, 32 Miss. 236. In Moreton v. Harrison, 1 Bland, 491, the chancellor attained a different conclusion; but the distinction above stated does not seem to have been considered by him, and the case was never carried to the court of appeals.

3. The complainant's claim to relief is barred by the staleness of his demand. At least two of the installments of the debt were due more than ten years before the bill was filed. The right to foreclose accrued upon the failure

to pay the first installment : the mortgage was then forfeited, and the bar commenced its operation from that time, although the last installment was not then due. *Nevitt v. Bacon*, 32 Miss. 227. The claim of a mortgagee is among that class of cases in which the doctrine of staleness is applied.—*Angell on Lim.* § 455. Reason, analogy and sound policy demand, that some period should be fixed, at which equitable claims shall be held, *prima facie*, barred by mere delay ; and that period must be the time limited for the recovery of the subject-matter of the claim. The old decisions, fixing twenty years as the period of prescription for equitable demands relating to real estate, were made while that was the period within which an action at law might be brought for the recovery of land. But the same reasons which then demanded the establishment of that period, now that the limitation at law has been shortened by statute, demand a corresponding change in the equitable bar. The doctrine of staleness is founded on principles of public policy : the peace of society demands the discouragement of antiquated claims. These considerations apply with peculiar force to the facts of this case. The complainant allowed six years in the lifetime of his debtor, and five years after his death, to elapse before taking the first step for the recovery of his debt. He has not the slightest evidence of the debt which he seeks to enforce, except the original verbal contract ; and the only person adversely interested, who could explain the facts, is dead. After this lapse of time, if the debt was paid, the evidence of payment would probably be lost. To enforce his claim under such circumstances, in the face of his unexplained and unaccountable delay, when it is not pretended that there was ever any recognition of his debt, or any request for indulgence, would be a practical abrogation of the rule which requires diligence from suitors.

A. J. WALKER, C. J.—We approve, and are content to abide by, the decision in *Driver v. Hudspeth*, 16 Ala. 348, that the lien of a vendor, who has made an executory contract for the sale of land, is not destroyed, because an



action to recover the purchase-money is barred by the statute of limitations. The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as for example a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract. Thus the lien of a pawnee, of an attorney, or of an acceptor having a collateral security, survives the bar of the debt by the statute of limitations.—Ang. on Lim. § 73; *Morse v. Williams*, 3 Camp. 418. The principle is, that the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law; and there is no inconsistency in the prosecution of another remedy after the action at law is barred.—*Higgins v. Scott*, 2 B. & A. 413.

The decisions in New York and Mississippi, cited for the appellee, take a different view of the question; and one of them refers the preservation of a mortgagee's lien, after an action is barred, to the fact that the mortgage is under seal, and therefore its enforcement is governed by a different statute of limitations; and the other, that the mortgage is separate and distinct from the debt, and a more solemn acknowledgment of and security for the debt, while the vendor's lien is a mere incident to the debt inferred by the law. These decisions are not, in our judgment, correct expositions of the law. The lien of a vendor and a mortgage are alike—in the same sense, and to the same extent—incidents of the debt. They are alike transferred by an assignment of the debt, and neither can survive the extinguishment of it; and the vendor and mortgagee alike have independent remedies, by taking possession, and by proceeding in chancery for a sale to pay the debt. The decision of this court is supported as well by authorities as by principle.—*Hopkins v. Cockrell*, 2 Grat. 86; *Reed v. Minell*, 30 Ala. 61; *Cross on the Law of Lien*, 13, (34 Law Library); *ib.* 355; *Spears v. Pently*, 3 Esp. 81; 2 *Parsons on Con.* 379; *Bradford v. Spyker's Adm'r*, 32 Ala. 134; *Morton v. Harrison*, 1 Bland, 491; 1 *Hilliard on Mortgages*, 656; also, authorities upon brief of appellant's counsel.

[2.] So far as the question of staleness, as well as most other questions, is concerned, the vendor of land stands precisely as a mortgagee. We have decided, after careful consideration, that the possession of the mortgagor is not adverse to the mortgagee; and that the mortgagor can not invoke the analogy of the statute of limitations, in the absence of a holding positively hostile to the mortgagee, to defeat a bill to foreclose.—*Bird v. McDaniel*, 33 Ala. 18. We must adopt the same principle in reference to a vendor's bill to enforce his lien. If the vendee is regarded as holding under the vendor—if his possession is the possession of the vendor—it would be a violation of all precedent and principle to allow the acquisition of title by lapse of time. It would be like making lapse of time the origin of title in the tenant against his landlord. The law is well settled, that the only doctrine available to the mortgagor, who holds in subordination of the mortgage, is the presumption of payment after the lapse of twenty years.—*Angell on Lim.* §§ 452–53; 1 *Hilliard on Mort.* 473; 2 *ib.* 505, chap. 26; *Christopher v. Spark*, 2 Jac. & W. 233; 1 *Powell on Mort.* 396 *a*, and 397, and note.

We conclude, that none of the objections made in the argument of counsel to the equity of the bill are maintainable; and we direct that the chancellor's decree be reversed, and the cause remanded.

STONE, J., not sitting.

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## STALLWORTH vs. PRESLAR.

[ACTION FOR CONTRIBUTION BETWEEN SURETIES.]

1. *When action for contribution accrues.*—A surety, against whom a judgment is recovered, or whose liability is otherwise fixed and matured, may pay the debt immediately, without waiting for the issue of execution; and his right of action against his co-surety for contribution accrues at the time of such payment, without reference to the time when the original contract matured.

2. *When action for contribution lies.*—Conceding that one surety cannot maintain an action for contribution against his co-surety, until he has paid a greater sum than the latter remains liable to pay; yet, if he has discharged and satisfied the entire debt, though by the payment of less than one-half its amount, he may recover contribution from his co-surety.
3. *Admissibility of parol evidence to explain receipt.*—In an action for contribution between sureties, the plaintiff having taken a written assignment of the judgment paid by him, expressing therein the receipt of the money paid, parol evidence is admissible to show that the judgment, which was described as having been rendered by the *circuit* court, was in fact rendered by the *county* court.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

THE complaint in this case was as follows :

“ William M. Stallworth } The plaintiff claims of the  
                                   vs.                                    } defendant the sum of five hun-  
                   Holden Preslar.                                } dred dollars, being one-half  
 the sum of one thousand dollars, paid by said plaintiff in  
 satisfaction of a certain judgment rendered in the county  
 court of Monroe county, Alabama, at its January term,  
 1842, for the sum of three thousand four hundred and  
 sixty-six 31-100 dollars, together with the costs, in favor  
 of Halsey, Utter & Co., against Thomas R. Watts and  
 said plaintiff; said judgment being founded on a promis-  
 sory note for the sum of two thousand six hundred and  
 forty-six 04-100 dollars, made at Sparta, Alabama, on the  
 11th July, 1837, negotiable and payable at the Branch  
 Bank at Mobile, due on the 1st day of March next after  
 the date thereof, signed by said Thomas R. Watts, said  
 defendant and plaintiff, and in favor of Halsey, Utter &  
 Co. And said plaintiff avers, that he, together with said  
 defendant, signed said note as the sureties of said Watts;  
 that suit was brought on said note by Halsey, Utter & Co.,  
 against said Watts, plaintiff and defendant; that said  
 suit was discontinued as to said defendant, because the  
 writ was not served on him; that the judgment herein-  
 above mentioned was rendered against said Watts, who  
 then was, and continued thereafter to be insolvent, and  
 died insolvent, without having paid said judgment, which  
 was also rendered against plaintiff; which said judgment



being unreversed and in full force, plaintiff has paid and satisfied the same by the payment of one thousand dollars, to-wit, on the 15th April, 1854. By means whereof, the defendant became liable to pay and reimburse to plaintiff the said sum of five hundred dollars, with interest thereon, being one-half of the said sum of one thousand dollars. The plaintiff claims of the defendant, also, the further sum of five hundred dollars, for moneys paid, laid out and expended, by said plaintiff, for said defendant, at his request, to-wit, on the 15th April, 1854. Said sums of money, with the interest thereon, remain unpaid."

The defendant demurred to the first count of the complaint, on the following grounds: "1st, because it shows on its face that the plaintiff's cause of action, if any such he ever had, is barred by the statute of limitations of six years; 2d, because it shows a state of facts, in the compromise or satisfaction of the judgment of Halsey, Utter & Co., (which is alleged to be for the sum of \$3,466 31,) for the sum of one thousand dollars, which contradicts the idea that said last named sum was paid by plaintiff, in satisfaction thereof, by compulsion, and does not aver that it was paid by compulsion; 3d, because it does not aver that plaintiff paid, on the judgment of said Halsey, Utter & Co., more than his share or aliquot proportion thereof, calculated on all the parties to the judgment, or the note on which the judgment is alleged to have been obtained; 4th, because it shows that plaintiff did not pay on said judgment as much as his legal liability, or aliquot proportion thereof, calculated upon all the parties who were originally bound on the note alleged as the foundation of said judgment; 5th, because it does not allege that said Watts, the principal in the note sued on, is, or at any time was, insolvent, or unable to pay said judgment; 6th, because it does not allege that, at the time said one thousand dollars was paid, said Halsey, Utter & Co. then held a judgment against him, on which an execution could issue; and, 7th, because it does not show that said suit was dismissed, as to this defendant, because he was not found." The court sustained this demurrer; and the defendant then pleaded, to the second count in the com-

plaint, the statute of limitations of six years, and the general issue, "with leave to give in evidence all other special matters of defense under the plea of the general issue."

On the trial, as the bill of exceptions shows, the plaintiff proved the rendition of the judgment against said Watts and himself,—the suit having been discontinued as to the defendant, because he was not served with process; the execution of the note on which the judgment was founded,—himself and the defendant signing it as sureties for Watts; an assignment of the judgment by the plaintiffs to one A. J. Robertson, in which it was described as a judgment in the circuit court of Monroe; and an assignment by said Robertson to plaintiff, dated the 22d April, 1854, in which the judgment was similarly described, and which acknowledged the receipt of one thousand dollars paid by plaintiff, in full of Robertson's right, title and interest in the judgment. For the purpose of showing that the judgment was incorrectly described in the assignments, and that the only judgment obtained by Halsey, Utter & Co. against said Watts and plaintiff was rendered in the county court, as shown by the transcript which had been read in evidence, the plaintiff offered to read the depositions of the clerk of the circuit court of Monroe, the attorney of said Halsey, Utter & Co., and one of the members of said firm; each of whom testified to those facts. All this evidence was excluded by the court, on the ground that parol evidence was not admissible to contradict the written assignments; and the assignments also were then excluded from the jury, on the defendant's motion, on the same ground.

In consequence of these rulings of the court, to each of which an exception was reserved, the plaintiff was compelled to take a non-suit; which he now moves to set aside. The errors assigned are, the sustaining of the demurrer to the first count in the complaint, and the rulings of the court on the evidence.

MANNING & WALKER, for appellant.

WM. BOYLES, *contra*.

STONE, J.—When two or more persons jointly become sureties for another, on a note for the payment of money, each surety becomes liable to the other to pay his share of the liability, in the event the principal fails to do so. *Pait v. Pait*, 19 Ala. 713; *White v. Banks*, 21 Ala. 705; *Taylor v. Morrison*, 26 Ala. 728; *Martin v. Baldwin*, 7 Ala. 923.

In such case, if the principal fails to pay, and one of several sureties is forced by suit to pay the debt, there accrues to the surety so paying, *at the time of the payment*, a right of action against his co-surety for contribution. The surety sued need not wait until the money is forced out of him by execution. He may pay as soon as judgment is recovered against him, or his liability otherwise fixed and matured, and does not thereby forfeit his right to contribution from his co-sureties. Money thus paid is, to the extent of the liability of the co-surety to contribute, considered in law as paid at the special instance and request of the co-surety; and at that precise time, the cause of action to recover on such implied promise accrues, without reference to the time when the original contract matured.—*Knox v. Abererombie*, 11 Ala. 997; *Broughton v. Robinson*, 11 Ala. 922; *Roberts v. Adams*, 6 Por. 361; *Young v. Clark*, 2 Ala. 264; *May v. Long*, 6 Ala. 107; *Martin v. Baldwin*, 7 Ala. 923; *Jones v. Lightfoot*, 10 Ala. 18; *Hooks v. Br. B'k Mobile*, 8 Ala. 580; *Couch v. Terry*, 12 Ala. 225; *Pearson v. Gayle*, 11 Ala. 278; 1 *Parsons on Contracts*, 32 to 37.

[2.] The fact that Mr. Stallworth, for the sum of \$1000, discharged the debt for which he and Mr. Preslar were liable as sureties, can have no effect on the rights of the parties, farther than to reduce the amount of the latter's liability. In this class of cases, equality is equity; and the debt having been, as it is contended, discharged by the payment of \$1000, Mr. Preslar is only liable to contribute his proportion of that sum, with interest from the time of payment.—*Steel v. Mealing*, 24 Ala. 286; *Br. Bank of Mobile v. Robertson*, 19 Ala. 798; *Cullum v. Br. Bank of Mobile*, 23 Ala. 797; *Martin v. Baldwin*, 7 Ala. 923; *Pinkston v. Talliaferro*, 9 Ala. 547; *Bizzell v. White*,



13 Ala. 422. It may, without affecting the result of this case, be conceded, that unless the plaintiff can show that he has paid a greater sum than the defendant remains liable to pay, he cannot maintain this action.—See *Ex parte* Gifford, 6 Vesey, 805. If, however, the entire liability is discharged—canceled—against both sureties, then the plaintiff has paid a greater sum than the defendant can ever be required to pay to the creditor; for he can never be required to pay anything to him. In such case, if he is not liable to his co-surety, he is liable to no one. The result of the rule contended for would be, to give him the benefit of the plaintiff's bargain, without imposing on him any of its burdens. Suppose the compromise, or accord and satisfaction, had proceeded on the terms of the payment by Stallworth of one-half the liability, and for that consideration the creditor had canceled the entire liability as against all the obligors. Is it not manifest that, under such a rule, Preslar would become the recipient of all the benefits of Stallworth's bargain? This could not be equity, because it is not equality. Under well defined rules, Stallworth, at the time he made the payment, had the clear right to pay the entire debt, and then to recover one moiety thereof from Preslar. To hold that, because he secured better terms than the law required he should demand, he thereby forfeited his right to contribution, would lead to the most shocking injustice.

Another view of this question: Suppose Mr. Stallworth had paid to Halsey, Utter & Co. their entire demand, and had subsequently received from Watts, his principal, indemnity for one-half the amount; or suppose an execution, issued upon the judgment, had been levied, as to half the amount, of the goods of Watts; and he, Watts, having no other effects, the remaining half had been paid by Stallworth. If, in the case first supposed, Stallworth had sued Preslar for contribution, the latter could claim an equal benefit in the indemnity furnished by Watts, their common principal.—*Bizzell v. White*, 13 Ala. 422; *Pinkston v. Talliaferro*, 9 Ala. 547. Being, under this rule, entitled to share in all the advantages secured by

his co-surety's diligence, he must, to the extent of his share of the mutual liability, contribute to the burdens which that liability imposes.

These rules show clearly that the circuit court erred in sustaining defendant's demurrer to the first count of the complaint.

Under the rules above declared, the plaintiff's right to recover in this action, depends on the fact that he and the defendant were co-sureties of Mr. Watts, their common principal; and that after default by the principal, the plaintiff has paid more than his *pro-rata* share of the liability. This, we have seen, does not render it necessary that he shall have paid more than one-half of the original liability, provided the debt to the creditors has been extinguished as against all the obligors. Proof, then, of these facts, makes a *prima-facie* case for recovery. Any testimony which legitimately tends to establish either one of these facts, is legal and competent, and should not be rejected.

[3.] If, in the present suit, it were necessary that the plaintiff should base his right of recovery on the assignment of the debt or judgment to him, it may, perhaps, admit of question, whether he could, in an action at law, be allowed to prove, by parol, that there was a mistake in the written contract. We need not and do not now decide this question. His right, however, in this connection, was dependent, not on the *assignment* to, but on the *payment* of the judgment by him. The paper evidence, so far as it was a mere receipt for money, was open to explanation or contradiction by oral evidence.—1 Greenl. Ev. § 305.

In point of fact, the judgment in favor of Halsey, Utter & Co. v. Watts and Stallworth, though rendered by the county court of Monroe, was, at the time of its liquidation by Stallworth, pending in the circuit court of that county; the county courts having been before that time abolished, and their records transferred to the circuit courts.—See Glass v. Glass, 24 Ala. 468.

The oral testimony of the witnesses, tending as it did to show that the payment made by Stallworth was on the

judgment rendered by the county court, should have been received.

The judgment of the circuit court is reversed, the non-suit set aside, and the cause remanded.

### RODGERS' ADM'R vs. BRAZEALE.

[ACTION AGAINST ADMINISTRATOR OF DECEASED WIFE, ON OPEN ACCOUNT FOR ARTICLES OF FAMILY SUPPLY.]

1. *Demurrer to amended complaint.*—When the original complaint has been amended, by the addition of another count, a demurrer to the amended complaint, for causes to which the original count is not obnoxious may be overruled entirely.
2. *Error without injury in rulings on pleadings.*—The sustaining of a demurrer to a special plea, when the defendant had the benefit of the same facts under the general issue, is, at most, error without injury.
3. *Requisites of plea.*—A plea which professes to answer the entire complaint, but which presents no defense to one of the counts, is bad on demurrer ; so also is a plea which states a legal conclusion, instead of facts.
4. *When action lies not against wife's administrator.*—An action at law does not lie against the administrator of the deceased wife, to charge her separate estate with the payment of articles of "comfort and support of the household," (Code, § 1987,) furnished during the coverture.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by James K. Brazeale, against the administrator of Mrs. Malinda J. Rodgers, deceased. The original complaint was in these words : "The plaintiff claims of the defendant one hundred and eighty-five dollars, due from the defendant's intestate by account made by her during the years 1853, 1854, and 1855, for goods, wares and merchandise sold and delivered to her in her life-time, at her special instance and request ; which sum of money, with the interest thereon, is now due and unpaid."

"The plaintiff had leave," says the judgment entry,



"to amend his complaint, which he did by filing an additional count;" and an "amended complaint" is copied in the record, in the following words: "The plaintiff claims of the defendant, as the administrator of Malinda Rodgers, deceased, one hundred and eighty-five dollars, due from him as such administrator, for merchandise, goods and chattels, sold by McInnis & Crum to Simeon Rodgers in the year 1853; and goods, wares and merchandise sold by Crum & Watson to said Rodgers in the year 1853; and for goods, merchandise and chattels, sold by B. D. Crum to said Rodgers in the year 1854. And the plaintiff avers, that the defendant's intestate, during all of the years 1853 and 1854, was a married woman, the wife of said Simeon Rodgers; and that said Malinda was married to said Simeon Rodgers, in the State of Alabama, in the year 1850; and that at the time of her marriage with said Simeon, and thereafter until her death, the said Malinda owned and possessed, as her sole and separate estate, a large estate consisting of slaves and other personal property; and that said estate was made the separate estate of said Malinda by virtue of her said marriage, and by the force and effect of the laws of Alabama; and that said Malinda, during the years 1853 and 1854, resided with her said husband in said county, and, during all that time, owned and possessed said separate estate under and by virtue of the act of 1848, commonly called the 'married-woman's law,' and of the statutes of said State. And the plaintiff further avers, that the goods, merchandise and chattels aforesaid were articles of comfort and support of the household, suitable to the degree and condition in life of the said Malinda; and that the said Simeon Rodgers, during the years 1853 and 1854, was insolvent; and that the said separate estate of the said Malinda, since her death, went into the possession of the defendant as her administrator; which sums of money, with the interest thereon, are now due, and the property of the plaintiff."

The defendant demurred to the amended complaint, on the following grounds: "1st, because an action cannot be sustained against the administrator of a deceased married woman, for articles sold her husband in her life-time;

2d, because it is not averred that the husband has been first sued, and a return of 'no property' had against him." The court overruled the demurrer, and the defendant then pleaded, "1st, *non assumpsit* ; 2d, coverture of his intestate ; 3d, that there was no contract by the wife to bind her separate estate, and it is therefore not liable." The plaintiff demurred to the 2d and 3d pleas, and the court sustained the demurrer ; and the cause was tried on issue joined on the 1st plea.

"On the trial," as the bill of exceptions states, "the plaintiff offered evidence tending to show that, at the dates of the several accounts sued on, the defendant's intestate was a married woman, and possessed a separate estate under the act of 1848. The accounts were contracted by her husband, in 1853 and 1854, during the coverture, and consisted entirely of articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law." "The defendant asked the court to instruct the jury, that the plaintiff could not maintain this action against him, even admitting that her [intestate's] separate estate would have been liable in her lifetime for the plaintiff's demand, because, according to the statute upon that subject, the husband was not and could not be joined with her as a defendant in the action ; which charge the court refused to give, and the defendant excepted."

The rulings of the court on the pleadings, and the charge to the jury, are now assigned as error.

D. S. TROY, for appellant.

PETTUS, PEGUES & DAWSON, *contra*.

R. W. WALKER, J.—1. The judgment entry informs us, that the "plaintiff amended his complaint by filing an additional count." The complaint, as amended, consisted therefore of the 'original' and the 'additional' counts ; and the demurrer being to the amended complaint, was properly overruled, if either count was good, or was free from the specific objections pointed out by the demurrer.

Ferguson v. Baber, 24 Ala. 402. Neither of the causes specified in the demurrer applies to the original count, and there was, therefore, no error in overruling it.—Code, § 2253; Morton v. Bradley, 27 Ala. 640; McElhaney v. Gilleland, 30 Ala. 183.

2. If it be conceded that the second 'plea' is to be construed as averring that the defendant's intestate was a married woman at the time the contract was made, still, as this defense was admissible in evidence under the general issue, which was also pleaded, the sustaining of the demurrer was error without injury.—Rakes' Adm'r v. Pope, 7 Ala. 161; McKenzie v. Jackson, 4 Ala. 230; Stein v. Ashby, 24 Ala. 521; 1 Chitty's Pl. 511-13. We think that, under the act of 1853-4, (Pamphlet Acts '53-4, p. 60,) the plea of '*non assumpsit*,' where the action is in the nature of a common-law action of assumpsit, has the same scope and effect as the same plea according to common-law rules, and the same defenses are admissible under it.

3. The third plea professes to answer the entire complaint. It was obviously defective as an answer to the first count; and not constituting a defense to the extent to which it professed to go, and being, besides, objectionable because it stated a legal conclusion instead of facts, and also because it assumes that the wife's separate estate would not be liable, unless she herself made the contract, the demurrer to it was properly sustained.—Shepherd's Digest, 721, §§ 199, 200, and cases cited.

4. The bill of exceptions shows affirmatively, that the accounts proved by the plaintiff "were contracted by the husband of the defendant's intestate during the coverture, and consisted of articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law." Upon these undisputed facts, the wife would not be suable at law, except by virtue of sections 1987-8 of the Code. These sections provide the only modes in which the separate estate of the wife may be subjected by action at law. The forms of redress designated for this purpose are—first, an action against the



husband and wife jointly; second, an action against the husband alone, to be followed upon the return of the execution against him 'no property found,' by a motion against the wife for an order to sell her separate estate to satisfy the judgment. It is obvious that no authority is given for a suit in the first instance against the representative of the deceased wife. The charge asked should have been given by the court, as, upon the facts stated, the plaintiff could not maintain the action.

The judgment is reversed, and the cause remanded.

### BRYAN vs. BRYAN.

[BILL IN EQUITY BY WIFE FOR CONTROL AND CUSTODY OF CHILDREN.]

1. *Burden of proof.*—When a sworn answer is not waived, an answer under oath, denying the allegations of the bill, casts upon the complainant the *onus* of sustaining those allegations by two witnesses, or by one witness with corroborating circumstances.
2. *Intemperate habits of husband as cause for removing custody of children.*—Proof of the fact that the husband was in the habit of drinking freely, and, in a few instances, to intoxication, is not sufficient to authorize the chancellor, on the application of the wife, to take away from him the custody of their children, when it is not shown that his drinking disqualifies him for business, or materially interferes with his business habits, or makes his association dangerous to his wife and children, or pernicious to the latter.
3. *Jurisdiction of chancellor over custody of children.*—Section 2006 of the Code, unlike the act of 1833, *May's Digest*, 171, § 20, gives the chancellor jurisdiction of the custody and control of children, as between husband and wife, only in cases of voluntary separation.
4. *What constitutes voluntary separation.*—A separation between husband and wife, to be *voluntary* within the meaning of the statute, (Code, § 2006,) must be by mutual consent: a voluntary abandonment of the husband by the wife, against his wishes and consent, and for causes which in law do not justify such abandonment, does not constitute a voluntary separation between them.
5. *What conduct of husband justifies abandonment by wife.*—Mere grossness of language on the part of the husband, rudeness of manners, and disrespectful bearing towards his wife, do not constitute a legal justification of her abandonment of him.

6. *Original jurisdiction of chancery court over custody of children.*—Independent of statutory provisions, the chancery court has jurisdiction over the custody of minor children, to be exercised for their welfare and benefit; but it requires a strong case to induce the court thus to interfere with the common-law rights of the father.
7. *When custody of children will not be taken from father.*—The chancery court will not, by virtue of its original jurisdiction over the custody of minor children, take away from the husband the custody and control of his children, (one a girl nearly five years old, and the other a boy nearly three years old,) and confide them to the wife, when it is shown that she has voluntarily abandoned her husband, against his wishes and consent, and without any legal justification for so doing; and it does not appear that the husband's character or habits would necessarily contaminate the children, or render them unsafe in his custody.
8. *Costs.*—A decree in chancery cannot be reversed, on error or appeal, solely on account of an error in the imposition of costs.

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. WADE KEYES.

THE petition in this case was filed by Mrs. Francis L. Bryan, the wife of Leonidas L. Bryan, and sought to remove their children from the custody and control of her husband. The opinion of the court contains a sufficient statement of the facts. On final hearing, on petition, answer and proof, the chancellor dismissed the petition, at the costs of the complainant's next friend; and his decree is here assigned as error.

THOS. WILLIAMS, for the appellant.

D. W. BAINE, *contra*.

A. J. WALKER, C. J.—A married woman, separated from her husband, seeks to exclude the latter from the custody of the two children of the marriage; one a girl, now four years and nine or ten months old, and the other a boy, now about two years and ten months old. The allegations of the petition are, that the husband is intemperate, is wasting his own and his wife's estate, has beaten his wife and the older child, threatened farther abuse of his wife, admitted adulterous intercourse with one or more women, used profane language in the presence of his wife and children, and, in fits of intoxication, broken his furniture; and that such conduct had compelled the

petitioner, with her children, to leave her husband, and to seek an asylum in her father's house, whence the defendant has made an ineffectual attempt to take them.

The defendant denies all the charges impugning his conduct as husband and father; and his answer, which is sworn to, casts upon the complainant the *onus* of sustaining those allegations by two witnesses, or by one with corroborating circumstances; for there is no waiver of an answer on oath.

The accusation that the defendant had beaten his wife, is unsustained; for the only witness who proves that he ever struck her, so testifies as to clearly indicate that he did nothing more than to slap his wife in a laughing and playful mood, or (as the witness expresses it) "in fun," and not in a rude or angry manner.

[2.] Nearly fifty witnesses are examined upon the subject of the defendant's intemperance. A careful examination of this immense mass of evidence convinces us that the defendant was in the habit of drinking freely, and in a few instances to inebriation; but that his drinking had not been carried sufficiently far to disqualify him for business, or materially to interfere with his business habits, or to make his association dangerous to his wife and children, or so pernicious to the latter as to authorize the taking away the custody of them.

The witnesses whose testimony seems designed to prove the commission of adultery by the defendant are Sheffield, Singletary, Bowen and Merriman. The first of those witnesses is shown by competent testimony to be unworthy of belief, and his evidence is itself improbable, and, if true, places him in a very degraded position. The witness Singletary is contradicted by three witnesses in material particulars. Bowen proves merely a jocular reply of defendant to a question of his wife, as to what he intended to do with his money in Mobile, which is entitled to no consideration as evidence of defendant's guilt. What we have said leaves the imputation of adultery to rest upon a loose remark made to Merriman, the witness. This witness is contradicted by Hobbs as to one of his statements, and the testimony of Sarah Bryan also



contributes to show the incorrectness of a part of his evidence. It is too clear for argument, that the testimony of this witness cannot overcome the denial of a sworn answer.

While the defendant must stand vindicated from the grosser charges made against him, yet it must be said to his discredit, that his language to his wife and about her has not been characterized by refinement or delicacy, but was often rude, harsh, and indecorous.

[3.] Section 2006 of the Code gives the chancery court jurisdiction over the custody and control of children, as between the father and mother, in cases of *voluntary* separation. This section differs from the old law, (Clay's Digest, 171, § 20,) in confining its operation to cases of voluntary separation.—*Cornelius v. Cornelius*, 31 Ala. 479.

[4.] The equity of this proceeding is not maintainable under that statute. The separation here is neither actually, nor in point of law, voluntary. The separation was against the husband's wishes, and in despite of his request. There may be a voluntary abandonment by the complainant of her husband, but there is not a voluntary separation. The statute contemplates a separation with the assent of both parties. It may be that the law would regard a separation as voluntary, implying the husband's consent, when his conduct was such as to justify his wife in leaving him. The facts here do not afford such justification to the wife. There is no correct view of the married relation, which will authorize a wife to leave her husband, and place both him and herself in the "undefined and dangerous situations of a husband without a wife, and a wife without a husband," merely on account of such rudeness of language, indelicacy of expression, grossness of manners, and disrespectful bearing, as may appear from the evidence in this case to have characterized the conduct of the defendant.—*People v. Mercein*, 8 Paige, 46; *Evans v. Evans*, 2 Haggard, 35. However hard it may be to endure such conduct, and however we may sympathize with and desire to relieve one subjected to it, the hardships of individual cases must be borne, and sympathy for

them must bend in deference to the great social interests, and wise public policy, and biblical precepts, in which are founded general rules consulting for the permanency and stability of the marriage institution. One who enters into this relation must, by a uniform exhibition of affection, by mild remonstrance, by gentle and moderate resistance, by judicious reasoning and soft persuasion, by a forbearance of resentment, by an accommodation to peculiarities, and, above all, by a constant display of an example of conjugal propriety, strive to cure such faults as the evidence imputes to the defendant. If such causes were recognized as a sufficient justification for a separation, the first unguarded sally of passion on the part of one of the married pair would often be met by unyielding harshness, and attended by an unforgiving temper, and thus become the ultimate cause of estrangement and abandonment. The abandonment of the conjugal home is without justification in law, and there is no conceivable ground upon which the separation can be deemed voluntary. It is the legal duty of the complainant, upon the facts before us, to return or offer to return to her husband, and carry with her the children of the marriage.

It is a question mooted in this case, whether the law will, under any circumstances, interfere in favor of the wife in reference to the custody of the children, when she has abandoned him without a legal justification. We cite some authorities in reference to that question, and leave it undecided.—*DeManneville v. DeManneville*, 10 Ves. 52; *Forsyth on Infants*, 21; *People v. Mercein*, 8 Paige, 46. But it is to our minds clear, that the court ought to hesitate long before it would interfere in behalf of a wife who has separated herself from her husband without his consent, and without adequate causes. The common love for the common offspring, and the common desire for their society, constitutes a strong tie between married people, and contributes to the steadfastness of the relation. This cohesive influence would be lost, if the unauthorized character of a separation is not regarded in disposing of the custody of the children.

[6-7.] As the equity of this proceeding can not be main-

tained under our statute, the question arises, can it be maintained under the principles which governed the jurisdiction of the chancery court over minor children at common law. The chancery court has jurisdiction, independent of the statute, over the custody of infant children. Story's Eq. Ju. § 1341. But in the exercise of that jurisdiction, respect is always paid to the prior common-law right of the father to the custody and control of his minor children.—*Ex parte* Boaz, 31 Ala. 425. This prior right of the father will be controlled and made subordinate to the interests of the children, but it requires a strong case to induce the court to interfere with that right.—*People v. Humphries*, 24 Barb. 521; *People v. Mercein*, 3 Hill, 399; 8 Paige, 46; 25 Wendell, 64; *Wellesley v. Duke of Beaufort*, 2 Russ.; *Wellesley v. Wellesley*, 2 Bligh, 124; *Anonymous*, 1 Sim. N. S. 54; *Commonwealth v. Briggs*, 16 Pick. 203; 1 Blacks. Com. 453; *Forsyth on Infants*, chap. 11, p. 19, (68 L. L. 14). Undoubtedly, stronger proof against the husband ought to be exacted, where, as in this case, the wife is living apart from the husband without his consent, and without the sanction of the law, and the wife herself does not appear to be well fitted for the task of training and controlling infants of tender age. The proof goes far towards showing an occasional indulgence on her part in paroxysms of causeless rage, in which she forgets the tenderness and kindness which a mother owes to her young children. Notwithstanding all these considerations, we would have been extremely reluctant at the commencement of this suit to have withheld our sanction to the protection of the mother in the custody of the children, because at that time one of them was an infant of ten months at the breast, and the other a girl only three years of age. But now the period of lactation with the younger child has passed, and two years have been added to the ages of the children; and it is not now impossible for the father to discharge the duties of nurture and care, in which he will be aided by his mother. Taking into consideration the fact that the defendant is not shown to be of such character, or to have such habits as would necessarily contaminate the children, or render



them unsafe in his custody, and the strong favor with which the law regards the father's prior right to the custody of his children, and the unauthorized state of separation from her husband in which the petitioner has placed herself, and her want of any peculiar fitness for the custody and care of the children, and also that the children have passed the age when the mother's care, though valuable and desirable, is indispensable, we deem it our duty to withhold any active interference in behalf of the wife's exclusive custody and control of the children.

We are not sure, that a part, if not all the costs in this case, ought not to have been imposed upon the husband; but if there be an error as to the costs, that is the only error in the case, and the established rule does not permit us to reverse a decree for an error of the chancellor as to the costs alone.—*Randolph v. Rosser*, 7 Port. 49.

In deciding this case, we have looked to the testimony in the record of the other case between the same parties, without deciding that there was such an agreement as would authorize us to do so, because in the absence of the evidence the result would have been the same, and we desired to settle the controversy on its merits.

The decree of the chancellor must be affirmed.

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## JOHNSON vs. MARSHALL.

[DETINUE FOR SLAVES.]

1. *Admissibility of record as evidence.*—In detinue for a slave, the record of a chancery suit, in which the plaintiff's vendor was complainant, and third persons were defendants, is not admissible evidence against the plaintiff, to show that, after the sale to him, his vendor also sold the slave to the defendants in that suit.
2. *Offer of evidence for specified purposes.*—When evidence is offered for several specified purposes, for some of which it is inadmissible, the court may exclude it altogether.
3. *Charge assuming fact not proved.*—A charge which assumes as true a fact which has not been proved, is erroneous.

4. *Measure of damages in detinue.*—In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial. •

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. WM. S. MUDD.

DETINUE by Matthew A. Marshall, against Abram Johnson and Thomas A. J. Cliatt, for four slaves, to-wit, Amos and Sylva, with their two children. The defendants executed the statutory bond, and retained the possession of the slaves. The cause was tried on issue joined, but no pleas appear in the record. The facts disclosed on the trial, and the rulings of the court to which exceptions were reserved, are thus stated in the defendants' bill of exceptions:

“The plaintiff introduced a witness who testified, that he knew the slaves sued for, the value of each, and the value of their hire. The plaintiff's counsel then asked said witness, ‘what is the value of each of said slaves separately.’ The witness stated the value of each separately, but did not state the time when they were worth those sums respectively,—only saying, ‘Amos is worth \$1400,’ and so on of the rest. He also stated the average value of each of the slaves, from the commencement of the suit to the time of the trial; and that he had known them to be in the possession of the defendants since the commencement of this suit. The plaintiff then proved the execution of a bill of sale to him by one James Thompson, dated the 24th May, 1847, for the two slaves, Amos and Sylva, with another named Tom; and then proved, that the other two slaves sued for were the children of said Amos and Sylva, and were born after the execution of the bill of sale, and while said slaves were in the possession of the defendants. He then read in evidence the detinue bond executed by the defendants, which recited the levy by the sheriff, and that the slaves were in the defendants' possession at the service of the writ, and was conditioned as the statute then required. The plaintiff having here rested his case, the defendants then read in evidence an instrument in writing, in the following words:

“The State of Alabama, } This is to show, that I have  
Sumter County. } this day purchased of James  
Thompson three negro slaves, to-wit, Amos, Tom and  
Sylva; which negroes said Thompson is to have back,  
whenever the sum of eleven hundred and thirty-two dol-  
lars is paid up to the said Marshall, with all the hire that  
may accrue before the discharge of the above mentioned  
sum. May 24, 1847.’ (Signed by M. A. Marshall, and  
attested by Thomas Shurley.)

“The defendants then offered in evidence the record  
of a suit in the chancery court of Sumter county, in which  
the said James Thompson was complainant, and John B.  
and William H. Thompson were defendants. This was  
offered for the pupose of showing that said James Thomp-  
son, after he made the said bill of sale to plaintiff, sold  
the said slaves to the said John B. and William H.  
Thompson, and delivered said slaves to them; that said  
slaves were afterwards restored to the possession of said  
James Thompson, by virtue of a writ of seizure issued  
out of the chancery court in said suit; and that upon the  
termination of said suit, and under a decree therein ren-  
dered, the said John B. and William H. Thompson recov-  
ered said slaves from the possession of said *Abram John-*  
*son* (?) who delivered them up to the said John B. and  
William H. Thompson in the year 1852. The court  
refused to permit this record to be read in evidence, for  
the purposes for which it was offered, and the defendants  
excepted. There was no evidence that the said slaves  
passed out of the possession of the said James Thompson,  
except that furnished by said bill and the said writing  
from Marshall to James Thompson.

“This being substantially all the testimony introduced  
on both sides, the defendants asked the court to charge  
the jury as follows:

“1. That the bill of sale and defeasance, taken  
together, constitute a mortgage, which is governed by the  
law applicable to mortgages in respect to their registra-  
tion; and that if said mortgage had not been recorded, it  
was void as to the defendant, who held under a purchase  
from James Thompson, without notice.’



“2. That the value of the slaves, in this action, should be ascertained at the commencement of the suit, or at the time of demand made; and that if the jury were not satisfied that the valuation, as shown by the evidence, related to that period of time, their finding must be for a nominal sum in respect to the valuation.’

“The court refused each of these charges, and then instructed the jury, ‘that they were authorized to find the highest value of the slaves proved, from the time the writ in this case was served, to the time of the trial.’”

The defendants excepted to the charge given, as well as to the refusal of the charges asked; and they now assign as error all the rulings of the court, as above stated, to which they reserved exceptions.

WM. BOYLES, and J. W. SHEPHERD, for appellants.

TURNER REAVIS, *contra*.

STONE, J.—This action of detinue for slaves was brought in the year 1850, by the appellee, against Abraham Johnson and T. A. J. Cliatt. The title of plaintiff consisted of a conveyance to him by one James Thompson, dated May 24th, 1847. After the plaintiff had made a *prima-facie* case, “the defendants offered in evidence the record of a suit in the chancery court of Sumter county, in which the said James Thompson was complainant, and John B. and Wm. H. Thompson were defendants, for the purpose of showing that the said James Thompson, after he made the said bill of sale to the plaintiff, sold the slaves mentioned in said bill of sale to the said John B. and William H., and delivered said slaves to them; that afterwards the said slaves were restored to the possession of the said James Thompson, by virtue of a writ of seizure issued out of the chancery court in said suit; and that upon the termination of said suit, and under a decree therein, the said John B. and William H. Thompson recovered said slaves out of the possession of the said Abram Johnson, who delivered them up, in obedience to said decree, to the said John B. and William H. Thompson, in the year 1852.” The court refused to permit this

record to be read in evidence, for *the purposes* for which it was offered, and the defendants excepted.

It is manifest that, for most of the purposes for which the record from the chancery court was offered, it was *res inter alios acta*, and inadmissible. For certain purposes, viz., that the judgment or decree was rendered, and the time when it was pronounced, the record being a public transaction, it was evidence for or against any person. It was not in this case, so far as we are informed, evidence of the facts recited in, or found by it. To point out no other objection, it was not, and could not be, evidence against the plaintiff in this suit of a sale by James, to John B. and William H. Thomson. The defendant specified the purposes for which he offered it in evidence, and the court refused to receive it for those purposes. The record does not inform us that the defendant desired to use the evidence, unless he would be permitted to use it for the purposes which he specified. The court was not bound to subject the offer to a rigid analysis, separating the legal from the illegal purposes; but was authorized to respond to the proposition as submitted. In this particular, the court committed no reversible error. 1 Greenl. Ev. §§ 538, 539, 522, 523, 404; McCravey v. Remson, 19 Ala. 430; Miller v. Jones, 29 Ala. 174. See also authorities collected in Shepherd's Digest, 612, 613; Harris v. Plant, 31 Ala. 639; Walker v. Blassingame, 17 Ala. 810; Garrett v. Garrett, 27 Ala. 687; King v. Pope, 28 Ala. 601; Shep. Dig. p. 596, § 170; Williams v. Fitzpatrick, 20 Ala. 791.

[3.] The bill of exceptions purports to set out the substance of all the evidence. It contains nothing which tends to show that defendant was a purchaser of the slaves from James Thompson. The first charge asked assumed it to be a fact, that defendant *held under a purchase from James Thompson*. For erroneously assuming this as a fact, if for no other reason, the court rightly refused to give this charge.—Hollingsworth v. Martin, 23 Ala. 591; McKenzie v. Branch Bank, 28 Ala. 606; Tarleton v. Johnson, 25 Ala. 300; Shep. Dig. 460, § 30.

[4.] The charge asked and refused, and the charge

given, on the subject of value, may be considered together. They present the only other question raised by the exceptions. We have found no reported case of an action in detinue, which considers the precise question here raised. In the case of *White v. Ross*, 5 S. & P. 123, 129, the slave which was the subject of the action had died pending the suit, and the defendant contended that he should not be held accountable for its value; that the proper measure of recovery was the value of the property at the time of the trial; and inasmuch as the slave was dead and valueless at that time, he should not be required to pay the alternate value. In replying to that position, Judge Taylor, in delivering the opinion of the court, said: "It is in no case determined, that the value of the property at the date of the judgment is to govern the verdict of the jury. Nor can I see any good reason, why a different rule should prevail in this case, from that which should govern in an action of trover; and I am strongly inclined to the opinion, that the verdict should be governed by the value at the time of suit brought, or demand made."

While the case of *Ross v. White* is an authority to the point, that the death or destruction of the property, pending an action of detinue for its recovery, does not prevent a judgment for its alternate value, it was not necessary to decide, nor was it decided, that the value at the time of demand made, or suit brought, is necessarily the measure of recovery. That case is also an authority, to some extent, favoring the idea, that there is an analogy between the actions of detinue and trover, in the matter of the assessment of value.

In actions of trover, it has long been the settled rule in this State, that the jury are not limited to any precise point of time in fixing the value of the property converted, but may locate it at any time between the demand and the trial.—See *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213; *Williams v. Crum*, 27 Ala. 468.

In *Archer v. Williams*, 2 Car. & Kir. (61 Eng. Com. Law,) 26, an action of detinue was brought to recover scrip which had been deposited with defendant. Pend-



ing the defendant's possession, the market value of the scrip had greatly deteriorated; but before judgment, the scrip was given up by the defendant. The question was the measure of damages; and the court, in charging the jury, said, "The measure of damages is the highest sum for which the scrip could have been sold, from the time of the detention until the time when it was returned. The plaintiff is entitled to the full amount. A wrongdoer cannot be let off with less than that."

The jury did not act on the direction of the judge, but assessed the damages at what they concluded was a fair average value of the scrip. The case was then, by consent, taken up as on a charge that the plaintiff was entitled to more than nominal damages. In the exchequer chamber, 5 Mann., Gran. & Scott, (57 Eng. Com. Law,) 318, the judgment was affirmed. See, also, Sedg. on Dam. m. p. 475, 497-8. These authorities certainly show that, in the action of detinue, the jury may regard the circumstances—the fluctuations in the value of the property—in assessing the plaintiff's damages.

In *Oden v. Stubblefield*, 2 Ala. 684-8, the plaintiff had but a life estate in the property; and the question was, whether the jury should graduate the alternate value by the value of the life estate, or should give the value of the absolute property. This court said: "It is difficult to conceive of any legal reason why the defendant in error should not, if entitled to the slaves, have had a verdict and judgment for their full value, so as to coerce their delivery. The action is detinue, and the primary object to be effected, the recovery of the specific property."

On principle, we think stronger reasons exist for giving the full value, when the action is detinue, than when the suit is in trover for the value of the property converted. The fact that the plaintiff sues in detinue, affords evidence that the plaintiff desires the specific property, and not its money value. This is almost universally the case, when slaves are the subject of litigation. If the plaintiff have no title, of course the measure of recovery is unimportant to either party. If, however, his title be the best, he

should have all the aids which the law can afford, to compel a restitution of his property. The defendant is not injured by an assessment of the highest value, because he can relieve himself by a restoration of the goods. We hold, therefore, that in actions of detinue, the same latitude of discretion in fixing the value is allowed to the jury, as has heretofore been settled as the true rule in trover.—See authorities *supra*.

Under this rule, the second charge asked should not have been given, and the affirmative charge is free from error.

Judgment affirmed.

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## BUCKNER'S ADM'R vs. STEWART.

[ACTION FOR CONTRIBUTION BETWEEN SURETIES.]

1. *Form of injunction bond, in description of obligee.*—An injunction bond, payable to “J. L. E., register in chancery,” which shows in its body that it is an obligation required by law to be made payable to the register in his official capacity, will be held good as a statutory bond, (Code, § 2973,) although the description of the obligee might raise a *prima-facie* intendment that it was payable to him individually.
2. *Same, as to amount of penalty.*—Although the statute requires that the penalty of an injunction bond shall be double the amount of the judgment sought to be enjoined, (Code, § 2973,) yet an excess of ten dollars above that amount will not destroy its validity and effect as a statutory bond.
3. *Suppression of deposition on account of defects in commission.*—In an action against an administrator, in his official capacity, it is not a good ground for suppressing a deposition, that the commission describes him as “administrator, &c.,” without adding the name of his intestate: such defects in the commission may be supplied by reference to the other papers in the cause.
4. *When action lies for contribution.*—On the dissolution of an injunction, either surety on the bond has a right to pay off the amount due, without waiting for the issue of an execution, and to claim contribution from his co-surety; and his right of action is not dependent on the insolvency of their principal.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. WM. M. BROOKS.

THIS action was brought by Samuel M. Stewart, against Thomas H. Lewis, as the administrator of John L. Buckner, deceased, to recover contribution for money paid by plaintiff, as co-surety with defendant's intestate, on an injunction bond, which was in the following words: "Know all men, by these presents, that we, John E. Rochell, Samuel M. Stewart and John L. Buckner are well and firmly bound unto James L. Evans, register in chancery for said 16th district, in the penal sum of two thousand three hundred dollars, lawful money of the United States of America, to be paid to the said James L. Evans, register, his successors or assigns; for which payment, well and truly to be made, we bind ourselves jointly and severally, and each of us our heirs, executors and administrators, firmly by these presents. Witness our hands and seals, this 9th day of May, A. D. 1855. Whereas, the above bound John E. Rochell this day filed his bill of complaint in our court of chancery, against Blair & Solomon, setting forth that, at the fall term, 1854, of the circuit court of Dallas county, said Blair & Solomon obtained a judgment against said Rochell, for the sum of eleven hundred and forty-five dollars, besides costs, and that an execution on said judgment is in the hands of the sheriff of Marengo county, and about to be levied upon the property of the said complainant; and said bill prays, among other things, that the sheriff of Marengo county be enjoined from levying said execution on the property of the complainant; and whereas, on the 9th May, 1855, the Hon. C. W. Rapier, one of the judges of the circuit court of this State, ordered that an injunction issue according to the prayer of the bill, on complainant giving bond, with surety, in double the amount of the judgment, and conditioned as therein required: Now, therefore, the condition of the above obligation is such, that if the above bound John E. Rochell, his heirs, executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid, the amount of the above named judgment, with interest, and shall also pay such costs and damages as may be awarded to the said Blair & Solomon on the dissolution of said injunction by the court of chan-



cery, by the bill filed by the said Rochell as aforesaid, then the above obligation to be void; otherwise, to remain in full force and virtue."

The complaint, as set out in the record, contains *four* counts; but the judgment entry and other parts of the record show that a demurrer was interposed to the first, second, and *fifth* counts, and sustained as to the two former. Omitting the first count, the other counts, as copied in the transcript, are as follows:

"2. And the plaintiff claims the further sum of twenty 55-100 dollars, for money paid out and expended by him, for the use, and at the instance and request of the defendant's intestate; for that whereas, by reason of the dissolution of the injunction, as above stated, the register in chancery for the 16th district, at Cahaba, issued a *fi. fa.* against the obligors on said bond above described, for the costs of said chancery suit, which amounted to forty-one 30-100 dollars; which said sum the plaintiff paid and discharged on the 7th September, 1857; and one-half of said sum, with interest thereon, is due to plaintiff from defendant's intestate.

"4. The plaintiff claims of the defendant, also, the sum of one thousand dollars, for money paid, laid out and expended for the defendant, as administrator as aforesaid, and at his special instance and request.

"5. The plaintiff claims of the defendant, also, the sum of one thousand dollars, for this: that after the said injunction bond was given, as set forth in the first count, and after said injunction was dissolved, as stated in said count, the register in chancery of said chancery court issued his certificate to the clerk of the circuit court, certifying that said injunction was dissolved, and that plaintiff and defendant's intestate were the sureties of said John E. Rochell on said injunction bond in said first count mentioned; and afterwards, on the 14th March, 1856, the defendant's intestate, then being the clerk of the circuit court of Dallas county, issued an execution, as such clerk, against said Rochell, and plaintiff and himself as the sureties of said Rochell, on said injunction bond, and in favor of Blair & Solomon, for the amount of said

judgment, with costs, in said injunction bond mentioned, with credits endorsed on said *fi. fa.*, as of the 3d May, 1856, for five hundred and seventy-one 40-100 dollars; and said writ of *fi. fa.* was returned to said circuit court, the 26th October, 1856, with an entry of satisfaction as to costs of said case in the circuit court, and a further credit of forty-one 26 100 dollars; and after the said writ was so returned, the defendant's intestate departed this life; and afterwards, on the 21st March, 1857, the clerk of said circuit court of Dallas county issued another writ of *fi. fa.* on said judgment and injunction bond, in favor of said Blair & Solomon, and against plaintiff as the surety of said Rochell on said bond, for the balance due on said judgment after allowing the aforesaid credits; and the plaintiff avers, that on (to-wit) the 5th day of May, 1857, he paid said sum, being the balance due on said execution, to the sheriff of Montgomery county, who had the same in his hands to be executed, the amount then due on said execution being seven hundred and thirty-nine 96-100 dollars; and that the said defendant, as administrator as aforesaid, although often requested, has not paid to said plaintiff one half of said sum so paid on said *fi. fa.*, nor any part thereof, but so to do does wholly fail and refuse."

The causes of demurrer specified to the *fifth* count were these: "1st, because it avers a statutory judgment and execution, when the bond was a common-law bond, and no execution could issue upon it, except upon a judgment in a suit upon it at common law,—said bond not being in double the amount of the judgment at law; 2d, because it avers a statutory judgment and execution, upon a bond not legal, but void for want of consideration, because payable to said Evans individually, and not as register; and, 3d, because it seeks to impose on defendant's intestate a liability to contribute, when he was not bound to do so by the bond signed by him, as described in said count." The demurrer to this count was overruled, and the defendant then pleaded the general issue, and the statute of non-claim.

"Before entering on the trial," as the bill of exceptions states, "the defendant moved to suppress the deposition

of James Y. Brame, a witness for the plaintiff. The court overruled the motion, and the defendant excepted."

On the trial, the plaintiff read in evidence the injunction bond above set out, a transcript of the proceedings in the chancery court showing the dissolution of the injunction, and the several executions issued on the bond and judgment; and proved his payment of the balance due on the last execution. "The plaintiff here closed his testimony, and the defendant offering no evidence, the court charged the jury, that if they believed the evidence, they must find for the plaintiff; to which charge the defendant excepted."

The errors now assigned are, the overruling of the demurrer to the fifth count in the complaint, the refusal to suppress the deposition of Brame, and the charge to the jury.

GEO. W. GAYLE, and THOS. H. LEWIS, for appellant.

BYRD & MORGAN, *contra*.

R. W. WALKER, J.—1. It may be, that an obligation payable to "James L. Evans, register in chancery," is, without more, *prima facie* payable to him individually; the addition "register in chancery," being regarded as *descriptio personæ*. But this *prima-facie* intendment may be repelled by the body of the instrument; and if, by reference to that, it is seen that the obligation is one which the law required should be taken by, and made payable to, the register in his official capacity, the mere fact that the promise is expressed to be to James L. Evans, register, instead of to him *as* register, does not deprive the bond of its character as a statutory obligation. The terms of the injunction bond, as set out in this complaint, clearly show that it is one of a class of obligations which the law requires shall be taken by, and made payable to, the register as such, and that it was designed to be given in conformity to the statute. If, in other respects, it has the requisites of a statutory bond, the court will consider it as given in compliance with section 2973 of the Code, and subject to all the remedies provided in relation to bonds



given under that section.—See Chapman v. Spence, 22 Ala. 591; Polk v. Plummer, 2 Humph. 500; Boles v. McCarty, 6 Blackf. 427; 1 Iredell, 155; 4 Humph. 334; 3 Dev. 284; 1 Hayw. 144. A note payable to A. B., executor, may be sued on by the executor as such, upon the averment that it was made to him *as* executor, and is assets of the estate.—1 Chitty's Pl. 20; Arrington v. Hair, 19 Ala. 244; Harbin v. Levi, 6 Ala. 399; Dunham v. Grant, 12 Ala. 105.

2. The Code requires that the bond shall be in double the amount of the judgment.—Code, § 2973. The objection that this cannot be considered a valid statute bond, because its penalty is greater by ten dollars than that required by law, is too technical to meet our approval, though it must be admitted that in some of the States this has been held a fatal defect. But the view which we take of the question is sustained by authority, and is certainly consonant to reason.—Bagby v. Chandler, 9 Ala. 770; McCaraher v. Commonwealth, 1 Watts & Serg. 21; Treasurer v. Bates, 2 Bailey, 376. Whether, in a statutory proceeding on such a bond, the sureties could be held liable beyond the prescribed penalty, we need not inquire. Nor do we intimate an opinion as to what would be the effect upon the bond, as a statutory obligation, if the penalty were less than that required by law.

3. It is at least questionable whether this court would revise the action of the court below in overruling a motion to suppress a deposition, unless the particular grounds of objection were specified when the motion was made. Walker v. Smith, 28 Ala. 569. We think, however, that there is nothing in the objection which is here suggested to the deposition of the witness Brame. The defendant was sued "as administrator of John L. Buckner," and he is so styled both in the summons and complaint. The other papers in the cause were, *prima facie*, sufficiently identified by simply describing the defendant "as administrator." Such defects in the commission may be supplied by other parts of the record.—Reese v. Beck, 24 Ala. 658; Jordan v. Hazard, 10 Ala. 221; Evans v. Norris, 1 Ala. 511.

4. The right of the plaintiff to demand contribution from his co-surety was in no sense dependent on the insolvency of their principal. The liability of the sureties was fixed upon the dissolution of the injunction, and either surety had the right, without even waiting for an execution to issue, to pay off the amount due on the bond, and claim contribution from his co-surety.—1 Parsons' Contr. 34; Odlin v. Greenleaf, 3 N. H. 270.

Judgment affirmed.

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### COWLES AND WIFE vs. MORGAN.

[BILL IN EQUITY TO SUBJECT WIFE'S SEPARATE ESTATE TO PAYMENT OF CHARGE.]

1. *Power of wife to charge statutory separate estate.*—Whether the wife has power to charge her statutory separate estate with the payment of any other debts than those specified by section 1987 of the Code—"this question," the court say, "we leave open and undecided, and when it shall hereafter arise, we will not regard ourselves as trammelled in its investigation by the incidental remark in *Durden v. McWilliams*, 31 Ala. 438."
2. *Difference between separate estates created by statute and by contract.*—An averment in a bill in chancery, that a married woman holds property "to her sole and separate use," shows that her estate was created by contract, and not by statute.
3. *Power of wife to charge separate estate created by contract.*—A promissory note, executed by the wife during coverture, jointly with her husband, is a charge on her separate estate created by contract.
4. *Form of decree directing application of surplus proceeds of wife's separate estate, after payment of charge.*—Where a sale of the wife's separate estate created by contract, for the satisfaction of a charge created by her, is ordered by the chancery court, the decree should direct the surplus of the proceeds of sale, after satisfaction of the complainant's debt, to be paid to her alone, and not to her and her husband; but the appellate court, while reversing the chancellor's decree for an error in this respect, will itself render the proper decree.

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by John H. Morgan, against Frederick A. Cowles, and Lucretia C., his wife;

and sought to subject Mrs. Cowles' separate estate to the payment of a note executed by her, jointly with her said husband, on the 16th January, 1857. It alleged, that the complainant instituted an action at law on the note, after its maturity, against both of the defendants, and obtained a judgment against the husband, but his suit was defeated as to Mrs. Cowles by the plea of coverture; that the husband was wholly insolvent, both when the judgment was rendered, and when the bill was filed; that Mrs. Cowles, at the filing of the bill, had in her possession certain property, "as her separate estate," consisting of slaves and a tract of land; "that she holds said property, with other personal property, the description of which is unknown to complainant, to her sole and separate use, and the same is not liable to the debts and contracts of her said husband." Mrs. Cowles interposed a demurrer to the bill, on the ground that it did not show the character of her separate estate—whether held by deed, will, or statute—and therefore was not sufficient to enable the court to subject her separate estate to the payment of the complainant's demand. The demurrer was overruled by the chancellor, and a decree *pro confesso* was afterwards entered against both of the defendants. On final hearing, the chancellor rendered a decree for the complainant, and ordered the master to sell so much of Mrs. Cowles' separate estate, described in the bill, as might be necessary to satisfy his claim, and, after paying the costs, to pay over any surplus that might remain "to the defendants." The chancellor's decree is now assigned as error.

O. S. JEWETT, for appellants.

TORREY & LESSLIE, *contra*.

A. J. WALKER, C. J.—The argument against the equity of the complainant's bill is, that a married woman's separate estate, existing by virtue of our statutes, can not be charged by her with the payment of her debts generally; and that it does not appear from the bill whether the separate estate of the feme-covert defendant was secured to her by contract, or is held under the statute.



It is not necessary for us to decide upon the former of the two propositions of the argument, because the latter is altogether untenable. We therefore leave the question of the liability of a married woman's separate estate held under our statutes to her debts, other than those described in section 1987 of the Code, open and undecided; and when the question shall hereafter arise, we will not, in investigating it, regard ourselves as trammelled by the incidental remark in *Durden v. McWilliams*, 31 Ala. 438.

[2.] The bill avers, that the married woman holds the described property "to her sole and separate use." This averment distinguishes her estate from that which is vested by our statutes. It is the characteristic of separate estates at common law, that they were held to the sole and separate use of the feme covert. The husband had no right, as against his wife, to control and manage such estate, or to receive the rents and profits, and the wife is as to it regarded as a feme sole.—*Roper v. Roper*, 29 Ala. 247; *American H. M. Society v. Wadhams*, 10 Barb. 597; *Willard's Eq.* 652, 645, 646, 647; *Jacques v. Methodist Epis. Church*, 17 Johns. 548; *Hooper v. Smith and Wife*, 23 Ala. 639; *McCroan v. Pope*, 17 Ala. 612; *Firemen's Ins. Co. v. Bay*, 4 Barb. 407; *Strong v. Skinner*, *ib.* 546; *Colvin v. Currer*, 22 *ib.* 371–384; *Brandon v. Robinson*, 18 Vesey, 434; 2 *Story's Equity Jur.* §§ 1391, 1392.

The separate estate existing by virtue of our statutes, is not "held to the sole and separate use of the feme covert." The husband has the right to control and manage it, and to receive the rents, income and profits, without liability to account therefor, unless he is deprived of the trust on account of incapacity or unfitness.—Code, §§ 1983, 1994. Property in which the husband has such rights, is not held to the sole and separate use of the wife; for, if held to the sole and separate use of the wife, the husband has no interest in it, and no right of control over it. *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9–11; *Colvin v. Currer*, *supra*.

[3.] The estate described in the bill being a separate estate at common law, there can be no doubt, under our

decisions, that the note executed by the wife, jointly with her husband, was, upon the facts stated in the bill, a charge upon the property.—Caldwell v. Sawyer, 30 Ala. 283; Shepherd's Digest, 275, §§ 52-59.

[4.] Upon the facts alleged in the bill, which the defendants must be regarded as admitting by suffering a decree *pro confesso* to be rendered, the property ordered to be sold belonged to Mrs. Cowles, and any surplus of the proceeds of the sale which may by possibility remain after paying the costs and debt, will also belong to her. The decree is, therefore, erroneous in giving direction for the payment of such surplus to the husband and wife. For this error, the decree must be reversed, and a decree must be here rendered, conforming in every respect with the decree of the chancellor, except that the register must be ordered to pay over any surplus which may remain, after discharging the costs of the court below, and the debt and interest thereon, to Mrs. Cowles. The appellee must pay the costs of this court.

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### BELL'S ADM'R vs. ANDREWS.

[ACTION ON OPEN ACCOUNT—PLEA OF SET-OFF.]

1. *Construction of bill of exceptions.*—In an action brought by an administrator, a recital in the plaintiff's bill of exceptions, which purports to set out all the evidence, that "the plaintiff proved his demand as administrator," is sufficient to show that he read in evidence his letters of administration.
2. *Failure to file claim against insolvent estate.*—A claim against an insolvent estate, which has not been filed within the time required by law, is not available as a set-off in an action brought by the administrator.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the administrator of John A. Bell, deceased, against Warren B. Andrews, to recover the sum of ninety-two 23-100 dollars alleged to be due by open account, and also on an account stated, "for work and labor done by plaintiff for defendant, and for board and lodging furnished by plaintiff to defendant, at defendant's special instance and request." The defendant pleaded, in short by consent, *ne unques administrator, non assumpsit*, payment, and set-off. "On the trial," the bill of exceptions states, "the plaintiff proved his demand as administrator, and closed. The defendant then proved, that plaintiff's intestate, at the time of his death, was indebted to him in a sum larger than the amount proved by the plaintiff. The plaintiff objected to the introduction of this evidence, on the ground that the estate of his intestate had been duly and regularly declared insolvent on the 12th October, 1857, (which was admitted;) and that neither the defendant, nor any one else for him, had filed said demand as a claim against said estate, verified by affidavit, as required by section 1847 of the Code, within nine months after the declaration of insolvency. The court overruled this objection, and the plaintiff excepted. This being all the testimony, the court then charged the jury, that if they believed the evidence, they must find for the defendant; to which charge also the plaintiff excepted." These two rulings of the court are now assigned as error.

J. D. F. WILLIAMS, for appellant.

GEO. W. GAYLE, *contra*.

STONE, J.—It is contended for appellee, that the judgment in this case must be affirmed, because he had, by his plea, put in issue the question whether the plaintiff was the administrator of John A. Bell; and that the bill of exceptions, which sets out all the evidence, does not show that he was such administrator. The argument is, that the court rightly instructed the jury, if they believed the evidence, to find for the defendant, because a link, indispensable to plaintiff's chain of evidence, was wanting. Without mentioning any other, there is one com-



plete answer to this argument. The bill of exceptions does not assume to set out the plaintiff's evidence in detail. No question seems to have been made in the court below on its admissibility. The statement in regard to the plaintiff's evidence is, "the plaintiff proved his demand as administrator." This recital is true, if the plaintiff had proved a contract made, or account stated, with him as administrator; or if he proved an indebtedness to John A. Bell, and that he, the plaintiff, was administrator of Bell. It is not true, if the proof only showed an indebtedness to the decedent, and failed to show that plaintiff was his legal representative. Under the rule which accords verity to the record, (see *Deslonde v. Darrington*, and citations, 29 Ala. 92,) this objection must be overruled. See, also, *Trowbridge, Dwight & Co. v. Pinckard*, 31 Ala. 424.

[2.] The estate of plaintiff's intestate had been declared insolvent, for more than nine months, and the claim which the defendant sought to set off had not been filed in the office of the judge of probate.—Code, § 1847. It is contended for appellant, that the claim was barred, and should not have been received to defeat his recovery. In *Murdock v. Rousseau's Adm'r*, 32 Ala. 611, we held, that a claim against an insolvent estate, which was not filed within nine months after the declaration of insolvency, was *barred* as a demand against the estate. We adhere to that opinion, and hold, that the claim offered as a set-off, if the facts be correctly set forth in this record, was not a subsisting demand.—See *Puryear v. Puryear*, at the present term.

Reversed and remanded.

PAULK *vs.* WOLFE, GILLESPIE & CO.

[BILL IN EQUITY BY WIFE TO PROTECT HER SEPARATE ESTATE AGAINST JUDGMENT CREDITORS OF HUSBAND.]

1. *How separate estate in wife may be created.*—It is now the settled law of this State, that a separate estate in a married woman may be created by a parol gift of slaves, consummated by delivery.
2. *Power of wife over separate estate.*—In the view of a court of equity, a married woman has the same power over her separate estate, created by contract, as if she were a feme sole, and may transfer or dispose of it at pleasure.
3. *Validity of voluntary conveyance of slaves belonging to wife's separate estate.*—If a married woman, owning a separate estate created by a parol gift of slaves, restores them to her grantor, and then accepts from him a deed, conveying them to her for life, to her sole and separate use, with remainder to her children, her husband's creditors cannot successfully impeach the deed for fraud, although the transaction was intended by the parties to defeat the supposed rights of such creditors.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Mrs. Martha Paulk, suing by her next friend, against her husband, their children, and certain judgment creditors of her husband; and sought to restrain the creditors from further proceedings at law, to subject to the satisfaction of their several judgments certain slaves, in which the complainant claimed a separate estate for life, with remainder to her children. The complainant's title to the slaves, as asserted in the bill, was derived from her father, Cyrus Billingslea, under a deed of gift, dated January 26, 1855, by which the slaves in controversy were conveyed, in consideration of natural love and affection, to the separate use of the complainant for life, with remainder at her death to her children. The creditors joined in an answer, alleging that the slaves went into the possession of the complainant and her husband, soon after their marriage, under a parol gift from Billingslea; and that the subsequent deed of gift was intended to hinder and defraud the creditors of the husband. A formal answer was put in by the guar-

dian *ad litem* of the children, and a decree *pro confesso* was entered against the husband. On final hearing, on pleadings and proof, the chancellor dismissed the complainant's bill; and his decree is now assigned as error.

CHILTON & GUNTER, for appellant.

BROCK & BARNES, *contra*.

R. W. WALKER, J.—There is a good deal of conflict in the testimony; but we concur with chancellor in thinking that the weight of the evidence establishes the following facts: The complainant, who is the daughter of Cyrus Billingslea, intermarried with Joshua Paulk, in the fall of 1845; and in the beginning of the succeeding year, the slaves in controversy went into the possession of the complainant and her husband, under a parol gift from her father to her, for her separate use. With some slight interruptions, the slaves remained in the possession of the complainant and her husband, (who, however, always disclaimed any right in himself, and recognized the title of his wife,) until the last of 1854, or the first of 1855, when they were returned to Cyrus Billingslea, who held them until the 26th January, 1855, when the deed under which the complainant claims them was executed. Upon the execution of the deed, the slaves were delivered to the complainant, and have ever since remained in her possession. In 1854, prior to the return of the negroes to Cyrus Billingslea, and the execution of his deed to the complainant, Joshua Paulk, her husband, failed. The debts due from him to the defendants were contracted partly in 1853, and partly in 1854; and some of the judgments founded on these debts were rendered in the fall of 1854, and the rest of them in the spring of 1855. These are substantially the facts established by the evidence.

[1.] That a separate estate in slaves may be created by a parol gift to a married woman, consummated by delivery, has been so often settled by this court, that we are not permitted to consider it an open question.—Crabb v. Thomas, 25 Ala. 212; Betts v. Betts, 18 Ala. 789; Gilles-



pie v. Burleson, 28 Ala. 552; Lockhart v. Cameron, 29 Ala. 355.

[2.] Under the parol gift from her father, the complainant took a separate estate in these slaves, which could not be subjected to satisfy her husband's debts. Over this estate, in the view of a court of equity, she had all the power of a feme sole, and could transfer and dispose of the same at pleasure.—McCroan v. Pope, 17 Ala. 612; Clancy's H. & W. 347; Roper v. Roper, 29 Ala. 251.

We can see no ground on which to doubt the right of the complainant to return these negroes to her father, and afterwards accept from him, in substitution for the absolute property in them which had previously belonged to her, a deed conveying to her only a life estate, with a remainder to her children. If any creditor of hers were injured by the conveyance, he could doubtless set it aside, and subject the entire property to the satisfaction of his debt. But no such pretense is alleged, and no such right asserted.

[3.] It is not unlikely, we think, that the parties did not understand the legal effect of the parol gift from the complainant's father to her; and that the surrender by her of her absolute property in the slaves, and the acceptance of the deed conveying to her but a life estate, with remainder to her children, were prompted by a mistaken apprehension that, in the absence of some written evidence of title, her husband's creditors might subject the property to the satisfaction of their debts. Let it be conceded that the deed was made with the purpose to avoid this result; are the appellees in a condition to avail themselves of the fraud, if in fact this be a fraud? An actually fraudulent intent, in respect to creditors, means that the design of the party was to prevent the application of his property to the satisfaction of debts for which it was or might be legally liable.—See Nicolson v. Leavitt, 4 Sand. S. C. 252. In this case, the most that can be said is, that the deed was made to defeat rights which had no existence, and to injure persons who could not be injured by it. For it is plain that these creditors could not have been prejudiced by this conveyance. They were not the

creditors of either of the parties to it; the property was not in anywise subject to their debts before its execution, and (no matter what were the secret motives of the parties) the conveyance has not, and could not have had the effect of delaying, hindering or defrauding them. A fraudulent deed is fraudulent only as to those who are or might have been injured by it. It is operative as between the parties to it, or as between either of them and a stranger, who is not a creditor or purchaser, and whose rights have not been in any way effected.—Code, § 1554; Wiley, Banks & Co. v. Knight, 27 Ala. 348; Thompson v. Moore, 36 Maine, 47; Randall v. Phillips, 3 Mason, 378; Menx v. Antony, 6 Engl. 411; Stevenson v. Newsham, 16 Eng. L. & Eq. 401.

The complainant is found in the possession of these slaves, under this deed from her father, which is valid upon its face. She will be protected in that possession, against all the world, except those who can show that some rights of theirs in relation to the property were or might have been prejudiced by the conveyance. A mere stranger, whose rights have been in no wise affected, will not be heard to suggest that the deed was fraudulent; and until the *bona fides* of the deed is questioned by some one who has the right to do so, the conveyance stands as valid and effectual.—Love v. Belk, 1 Ired. Eq. 163; Morey v. Forsyth, Walker's Ch. 465; 1 Smith's L. C. 42; authorities *supra*.

The decree is reversed, and the cause remanded.

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## ROUNDTREE vs. BRANTLEY.

[ACTION TO RECOVER DAMAGES FOR OVERFLOWING LAND.]

1. *Prescriptive easement*.—In an action to recover damages for overflowing plaintiff's lands by the formation of a sand-bank in a stream, caused by an accumulation of the sand which was washed down into the stream through

a ditch dug by defendant, a plea, averring that the ditch had been dug and used by the defendant for a period of ten or twenty years, presents no defense; for, although a right to an easement on another's lands may be acquired by adverse enjoyment, for the period which, under the statute of limitations, bars a right of entry on land; yet the presumed right is never allowed an extent beyond the adverse user, and the mere use of the ditch for ten or twenty years does not show any consequential injury to the plaintiff's lands for the same length of time.

2. *Limitation of actions for injuries to lands.*—An action to recover damages for overflowing lands is barred within one year; such action being governed by the 6th subdivision of section 2481 of the Code, and not by the first subdivision of section 2477.

APPEAL from the Circuit Court of Dallas.

Heard before the Hon. NAT. COOK.

The complaint in this case, as amended, was as follows:

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| <p>“Joseph J. Roundtree<br/>rs.<br/>John Brantley.</p> | } | <p>The plaintiff claims of the defendant \$25,000 damages, for this: That said plaintiff, on the — day of —, was possessed of a certain close, lying and being in said county of Dallas; and while plaintiff was so possessed, the said defendant, on the — day of —, cut a certain ditch, by which the waters from adjacent and circumjacent lands were turned into and across a certain stream or creek in said county, called ‘Blue Gut,’ and by said waters running into and across said creek, the sand was washed into the bed of said creek, and formed across and in the bed of said creek a mole or dam, by which the waters of said creek were obstructed from their usual and natural channel, and dammed up, and rolled back upon and overflowed plaintiff's lands, for a long space of time, to-wit, for the period of six years before the commencement of this suit; whereby plaintiff's crops were greatly damaged, and great loss resulted to him from such overflow in his crops, in the years 1852, 1853, 1854, 1855, 1856, and 1857, to the amount of twenty-five thousand dollars.</p> |
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“2. Plaintiff claims of defendant, also, other twenty-five thousand dollars, for this: That said plaintiff, on the — day —, 1857, and for a long time before that time, had been possessed of certain lands and a plantation, lying and being in said county, and while so possessed, the



said defendant opened up and widened a certain ditch upon lands lying around and near to said lands of said plaintiff, and thereby turned the waters into and across the channel of a certain creek in said county, called 'Blue Gut,' whereby the sand was washed into and across the bed of said creek, and heaped up and accumulated\* from time to time, until they formed a mole or dam in the bed of said creek, by which the waters of said creek were obstructed, and dammed up in the usual and natural channel of said creek, and turned back upon and overflowed plaintiff's aforesaid lands, and by which great loss resulted to plaintiff's crops in each year, from the year 1852 down to the present time; whereby he is damaged to the amount of twenty-five thousand dollars.

"3. Plaintiff claims of defendant other twenty-five thousand dollars, for this: That plaintiff, on the — day of —, was seized and possessed, as of his own right, of a large and valuable tract of land and plantation, which, before the trespasses hereinafter mentioned, was not subject to overflow, and was of great value, to-wit," &c.; "and the said defendant, on the — day of —, opened and widened a certain ditch upon lands near to and round about the lands of plaintiff, by which said ditch the waters were led to flow into and across a certain creek in said county, called 'Blue Gut,' and, in flowing into and across said creek, the waters washed in the sands, and accumulated them in the channel of said creek, until they have formed a dam or mole, by which the waters of said creek are dammed up, and obstructed, and thrown back upon plaintiff's lands, and have been frequently and for a long time overflowed and made subject to overflow; and by which large quantities of decayed and decaying vegetable matter are thrown back upon plaintiff's lands; by means whereof, said lands are rendered dangerous to live upon, or to cultivate, on account of sickness produced by the same; and by which also said lands are rendered unfit for cultivation, and greatly diminished in value; to plaintiff's damage twenty-five thousand dollars.

"4. Plaintiff claims of defendant other twenty-five thousand dollars, for this: That plaintiff was heretefore,

to-wit, on the — day of —, seized and possessed, as of his own right, of a large and valuable tract of land and plantation, of the value of twenty-five thousand dollars, in the county aforesaid; and the said defendant cut and opened a certain ditch, upon lands near to and round about plaintiff's said lands, by and through which the waters were led to flow into and across a certain creek, called 'Blue Gut,' and by the flowing in of said waters the sands were washed into and across said creek, and accumulated and heaped up, until they formed a dam or mole in and across the bed or channel of said creek, by which the waters of said creek were obstructed, and turned back upon and overflowed plaintiff's lands and plantation aforesaid; whereby great damage was done to plaintiff, in the loss of his crops, and in the loss of the use of timber upon said lands, and in the depreciation of the value of said lands, and in sickness produced by such overflows in plaintiff's family, and among his negroes, from the year 1852 to the present time; for which said several injuries plaintiff claims of defendant twenty-five thousand dollars damages aforesaid.

"5. Plaintiff claims of defendant other twenty-five thousand dollars damages, for this: That the plaintiff was, before and at the time of committing the several trespasses by the defendant hereinafter mentioned, and from thence hitherto has been, and still is, seized and lawfully possessed in his own right of a large and valuable tract of land, situated in said county of Dallas, and of the value of twenty-five thousand dollars, a large portion of which then was, and has since continued to be, cleared up and used for the purposes of cultivation; and the said defendant, on the — day of —, cut and opened certain ditches upon lands near and opposite to plaintiff's said lands, by means whereof, and through which, waters were led and made to flow into a certain creek, called 'Blue Gut,' contrary to their natural course, and in volumes much greater and larger than were wont to empty and flow into said creek, and whereby the amount of water in said creek was greatly increased and swollen; and said defendant cut and opened certain other ditches, below

and near to the plaintiff's said lands, by and through which the waters were made to flow and empty into said creek, below plaintiff's said lands, and thereby greatly increased the water in said creek, beyond the amount which naturally flowed therein; and said defendant also continued and opened and widened a certain other ditch, below the ditches hereinabove referred to, by which the waters of a certain branch were led to flow and continued to be flowed into and across said creek, below the places where the ditches before referred to emptied their waters into said creek; and by the flowing in of said waters, the sands were washed into and across said creek, and heaped up and accumulated, until they formed a dam or mole in and across the bed or channel of said creek, and the said waters were obstructed, and turned back upon and overflowed plaintiff's said lands and plantation; by means whereof, plaintiff's crops, then growing thereon, were greatly damaged, to-wit, in the years 1852, 1853, 1854, 1855, 1856, and continuously from thence down to the present time, and his said lands have been rendered unfit for cultivation, at, to-wit, in the county aforesaid; to plaintiff's damage twenty-five thousand dollars.

"6. Plaintiff claims of defendant, also, other twenty-five thousand dollars, as damages for this: That plaintiff was heretofore, to-wit," &c., "in possession, as of his own property, of a large and valuable tract of land and plantation in the county aforesaid, and which was of great value," &c., "and said defendant, on," &c., "cut and opened certain ditches on certain lands near and adjacent to plaintiff's said lands, by means whereof he flowed, and caused to be flowed, into a certain creek, called 'Blue Gut,' near to which plaintiff's said lands lay, a large amount of water, which had not, and otherwise would not have flowed into said creek; and by means whereof, the waters of said creek were greatly increased, and, in consequence thereof, spread and flowed over plaintiff's said lands and plantation; whereby plaintiff's crops thereon were greatly damaged, to-wit, in the year 1852, and from thence down to the present time, and his said lands have been and are greatly damaged and deteriorated in



value; for which said injuries, plaintiff claims the sum of twenty-five thousand dollars damages as aforesaid.

“7. Plaintiff claims of defendant, also, other twenty-five thousand dollars, as damages for this: That the plaintiff was possessed, as of his own property, of a large and valuable tract of land and plantation, in the county aforesaid, of the value of twenty-five thousand dollars; and the said defendant, afterwards, to-wit,” &c., “widened and continued open certain ditches on other lands, below and near to plaintiff’s said lands, whereby a large amount of water was, and has since continued to be, diverted from and out of its natural current and direction, and made to flow and run into and across a certain creek in said county, called ‘Blue Gut,’ below plaintiff’s said lands; and said waters, in flowing into and across said creek, washed and accumulated sand and other substances in said creek, and in the bed thereof, until they formed and continued a mole or dam, by which the waters of said creek were, and continue to be, dammed up and obstructed, and thereby are and have been thrown back upon plaintiff’s said lands; and by means whereof plaintiff’s said lands are, and have been frequently and for a long time, overflowed and made subject to overflow; and by means of which, plaintiff’s crops, grown upon said lands, were, and have continued to be, greatly injured and damaged, and he has been and is excluded from, and deprived of, the use and enjoyment of the said lands, and the same have been and are greatly damaged and lessened in value; to plaintiff’s damage twenty-five thousand dollars.”

The defendant filed five pleas, the 2d, 3d and 5th of which were as follows:

“2. For further plea to said several counts in said complaint set forth defendant saith, that as to the said several grievances in said complaint alleged to have been committed by him, in cutting, opening, deepening and widening the said ditch in said complaint mentioned, said plaintiff ought not to have or maintain his aforesaid action thereof against said defendant, because he saith that, at the time of the commission of the said supposed

grievances, said ditch was situated entirely upon the lands of the defendant, without this, that any part of said ditch was upon the lands of the plaintiff; and without this, that said ditch emptied the waters and sands therein flowing upon any part of the lands of the plaintiff. And the plaintiff (?) saith, that said supposed grievances, in said complaint mentioned, were not committed within the period of twenty years next before the commencement of this suit; but that the said defendant, during said period of twenty years, was seized, as of his own demesne in fee, of the lands upon which said ditch was, as set forth in said complaint, and of the lands upon which the water and other substances flowing through said ditch emptied; and during said period of twenty years continuously before this suit was brought, said defendant was accustomed to use and enjoy, and did use and enjoy, the benefits and advantages of said ditch in the drainage of his said lands, through which said ditch was cut, without any let, hindrance or interruption whatever, and at his free will and pleasure; and the defendant saith, that if any mole or dam was created in the creek, called 'Blue Gut,' by the flow of water and sand from said ditch, the same was created by the usual and accustomed flow of water and sand through said ditch for the said period of twenty years as aforesaid, and the injuries mentioned in the complaint are the same injuries which resulted from the creation of said mole or dam in the manner set forth in this plea, and none other; and this he is ready to verify," &c.

"3. The second plea is to be copied, except that ten years is to be inserted instead of twenty years; and this, by consent of counsel, is to stand for and as the third plea."

"5. For further plea in this behalf defendant saith, that the said supposed causes of action, in said complaint mentioned, did not, nor did any or either of them, accrue at any time within one year next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against him; and this he is ready to verify," &c.

The plaintiff demurred to each of these pleas, and as-

signed the following causes of demurrer: to the 2d and 3d pleas, "because neither contains any answer in law to the said several counts in plaintiff's complaint, and the matters and things therein alleged are not sufficient to bar said action; and because each of said pleas is double and argumentative:" and to the 5th plea, "because the matters and things therein alleged are not sufficient in law to bar plaintiff's said action." The court overruled the demurrers; and its action in this respect, to which the plaintiff excepted, and in consequence of which he was compelled to take a nonsuit, is now assigned as error.

ALEX. WHITE, for appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—The gravamen of the complaint is, that the defendant caused a sand-bank to be formed in a creek, by digging a ditch, in which the sand was washed down into the creek, and that the sand-bank thus formed dammed up the water, and caused the inundation of contiguous lands of the plaintiff, a super-riparian proprietor. The subject of complaint is the formation of the sand-bank, and consequential overflow.

The second and third pleas interpose as a defense the length of time which had elapsed since the cutting of the ditch, and that if any dam was created, it resulted from the accustomed flow of water and sand down the ditch into the creek during that time. The defense of these two pleas is the continued use of the ditch for the periods specified, and not the overflow of the plaintiff's lands during those periods. It is a prescriptive right to the ditch, and not an easement to overflow the plaintiff's land by an obstruction of the natural and accustomed flow of the stream. It is altogether consistent with the averments of the pleas, that although the ditch had been cut and used from a time sufficiently remote to precede the commencement of the period of prescription, yet the formation of the sand-bank had been gradually progressing, and did not attain such magnitude as to cause an overflow of the plaintiff's lands until within a very recent period. Thus



the pleas place beyond the period of prescription the act of the defendant, putting in operation the agency which, by a gradual accumulation of its effects, ultimately produced an interference with the plaintiff's rights; but do not show any disturbance of the plaintiff's right, or detriment to him, at a time beyond the period of prescription.

We entertain no doubt that, under the law as now recognized, a right to an easement upon another's land may be acquired by adverse enjoyment for a time corresponding with that which is prescribed in the statute of limitations in reference to the right of entry upon land. Angell on Water-Courses, §§ 208, 209, 223, and note 2, containing extracts from Starkie on Evidence; McArthur v. Carrie's Adm'r, 32 Ala.; Ricard v. Williams, 7 Wheat. Rep. 59.

But the doctrine of prescription, which the defendant invokes, is founded upon the idea of long enjoyment, and continued possession adverse to the plaintiff, which challenges the plaintiff's right, and in which the plaintiff acquiesces, or is presumed to acquiesce; and the right presumed is never allowed an extent beyond the adverse user.—Angell on Water-Courses, §§ 200, 210, 215, 221, 224, 379; Cockrell v. Brown, 33 Ala. 38.

Until the obstruction had been formed in the creek, there was no interference with any right of the plaintiff; there was no enjoyment or possession of his land, and there could be no acquiescence by him in any hostile claim to any thing which was of right his; and to allow the long user of a ditch, to drain the defendant's land, to create a presumption of a right to overflow the plaintiff's lands, would give to the prescription an effect far beyond the user.

The case of Flight v. Thomas, 10 Ad. & El. 590, is, in principle, analogous to this, and seems to decide the very point which the 2d and 3d pleas present. The plaintiff and defendant were occupants of adjoining premises; and the plaintiff alleged, that the defendant on his premises caused noxious smells, which rendered the plaintiff's "uncomfortable, unhealthy, unwholesome, and unfit for

habitation." The defendant pleaded the use of a mixen on his land for twenty years, *which produced noxious smells*, and that the smells complained of were necessarily produced by it. This plea being traversed, there was a verdict for the defendant. The plea was afterwards held bad, and the plaintiff was allowed to take judgment *non obstante veredicto*. The decision was placed upon the ground, that the plea did not allege a right to make the smell on the plaintiff's premises; that there could be no claim of an easement, unless it was made to appear that the offensive smells had been used for twenty years to go over to the plaintiff's land; and that the plea might be proved, without establishing the right to produce smells upon the plaintiff's land. Now here is a case, where the nuisance was alleged to have been a production of that which was possessed and used for more than twenty years; and yet the plea was held faulty, in not showing that the interference with the plaintiff's right had existed during the period of prescription. It seems to cover the precise question now in hand.—Sedgwick on the Measure of Damages, 107.

There is a class of cases, in which parties are allowed to institute suit before any actual injury is done; but it is only when some right of the plaintiff has been infringed. For instance, suit may be brought for the obstruction or diversion of water-courses, in infringement of the rights of the plaintiff, even before any actual damage is done; and two reasons are given for the doctrine—that wherever there is a wrong, there must be a remedy, and the plaintiff must at least be entitled to nominal damages; and that otherwise the adverse enjoyment might ripen into a title by lapse of time before there was any actual damage. Angell on Lim. § 300; Whipple v. Cumberland Manf. Co., 2 Story, 664; Bolivar Man. Co. v. Neponset Man. Co., 16 Pick. 241.

This case does not fall within the class above mentioned. The digging of the ditch did not, of itself, interfere with any right of the plaintiff, and gave rise to no cause of action in his favor. It did not at first obstruct the natural and accustomed flow of the stream. There

was no infringement of any right of the plaintiff, until the ditch had caused the formation of an obstruction; and consequently the computation of the period of prescription could not commence until that occurred.

Our investigations have not enabled us to find any ground, upon which the sufficiency of the second and third pleas can be sustained; and we must, therefore, decide that the court erred in overruling the demurrer to them.

[2.] The fifth plea simply relies upon the statute of limitations of one year.—Code, § 2481. The plaintiff's cause of action is clearly in trespass on the case. It is a consequential injury done to the plaintiff's right to have a stream, of which he was a riparian proprietor, flow in its natural and accustomed manner, whereby damage was done to his land and crops. It falls within subdivision 6 of section 2481 of the Code, which includes "civil actions for any injury to the person or rights of another, not arising from contract, and not (therein) specifically enumerated." In the article of which that section is a part, there is no other provision, which can include this cause of action. We have been referred to the first subdivision of section 2477, which makes six years the period of limitation to "actions for a trespass to real or personal property." It is argued that trespass is a comprehensive term, which includes trespass on the case; and that this cause of action is a trespass on the case to real or personal property, which is embraced in the section under the term "trespass." It is true that *trespass*, in one sense, means an injury or wrong; and, in that sense, it would include every cause of action, at least in tort. But trespass has, in the law, a well ascertained and fixed meaning. It refers to injuries which are immediate, and not consequential. It is clear that the word is used in that sense in section 2477. It would be a perversion of language to denominate an act, which produced a consequential injury to real or personal property, a trespass. It would be a perversion alike of the legal and common acceptation of the words. Besides, we are not sure that the construction sought to be placed upon sec-



tion 2477 would leave any field for the operation of the 6th subdivision of section 2481.

The judgment of the court below is reversed, the nonsuit set aside, and the cause remanded.

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## PURYEAR *vs.* PURYEAR'S DISTRIBUTEES.

[FINAL SETTLEMENT AND DISTRIBUTION OF INSOLVENT ESTATE.]

1. *Failure to file and verify claim.*—If any surplus remains in the hands of the administrator of an insolvent estate, after paying in full all the claims of creditors which were filed and verified within the time prescribed by the statute, (Code, § 1847,) the distributees of the estate are entitled to it, in preference to creditors whose claims were rejected because not properly filed and verified.

### APPEAL from the Probate Court of Monroe.

IN matter of the final settlement and distribution of the estate of Richard H. Puryear, deceased, which was duly declared insolvent on the 29th October, 1855. It appeared on said final settlement, at the December term, 1858, that there remained in the hands of the administrator, after paying in full all the claims against the estate which had been allowed by the court, a surplus of nearly nine thousand dollars. Thereupon, the children and distributees of the intestate, by their guardian *ad litem*, moved the court to distribute this balance among them; which motion was resisted by R. C. Puryear, H. A. Smith, H. J. Hunter and others, who claimed to be creditors of the estate, but whose claims had been rejected by the court, because, although they had been duly presented to the administrator, and filed as claims against the estate within nine months after the declaration of insolvency, they had not been verified until after the expiration of the nine months. On these facts, the probate court overruled the objections of said creditors, and distributed the

balance in the hands of the administrator among the distributees. The creditors reserved exceptions to this ruling of the court, and they here assign the same as error.

S. J. CUMMING, for appellant.

R. C. TORREY, O. S. JEWETT, and J. W. POSEY, *contra*.

STONE, J.—In *Murdock v. Rousseau's Adm'r*, 32 Ala. 611, we construed section 1847 of the Code, and held that a failure to file a claim against an insolvent estate, within nine months after the declaration of insolvency, completely destroyed such claim as a legal demand against the estate. We reluctantly feel constrained to adhere to that opinion, for the following reasons:

1. The imperative language of the statute;

2. The fact that the administrator is alone authorized to pay debts of the estate; that he alone is entitled to control and administer the assets; that the bar, when it attaches, is absolute, and certainly requires that we should hold that it destroys the claim as against the insolvent estate, and as against the administrator of such insolvent estate; the entire absence of legislation, authorizing any proceedings for the collection or payment of debts after the settlement of the insolvency; and the further fact, that such secondary or ulterior proceedings would not only be without legislative authority, but would be utterly repugnant to many provisions of our statutes.

3. The language which creates the bar in section 1847 of the Code is not less strong and emphatic than that employed in the statute of non-claim, which has always been held to operate a destruction of the liability.

4. We are unwilling to unsettle our former decisions, in the absence of a clear conviction that we had fallen into error.—*Thrash v. Sumwalt*, 5 Ala. 13; *The People v. White*, 11 Ill. 341.

The principle above announced probably suggests the necessity or propriety of further legislation. The corrective is not with us.

Judgment of the probate court affirmed.

## SALTER vs. IVEY.

[PROSECUTION BY APPORTIONER AGAINST OVERSEER OF ROAD.]

1. *Costs*.—When an action is instituted against a defaulting overseer of a public road, for a neglect of his official duty, (Code, § 1172,) the apportioner who made the return, and at whose instance the summons was issued, is not liable to a judgment for costs when the proceeding is quashed in the circuit court.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. NAT. COOK.

THE record in this case shows the following facts: On the 12th March, 1858, Turner Ivey, "apportioner of Mill beat No. 2 in said county," returned Z. W. Salter as a defaulter, "in failing to make all the hands apportioned to him in his precinct work on the road, with and when the other hands worked, at his last working in the spring of 1858." On this return being made, Salter was summoned before a justice of the peace of the county, "to appear and answer the complaint of Turner Ivey, apportioner of Mill beat No. 2;" the cause of action endorsed on the summons being in these words: "Failure to make John C. Lassiter's hands work the road, with the other hands, at the last working of said Z. W. Salter." The justice rendered judgment against Salter, for thirty dollars and costs; from which judgment Salter took an appeal to the circuit court. The record does not show that any complaint was filed in the circuit court; but the judgment entry recites, that "the defendant demurred to the summons and complaint," and that the court sustained the demurrer, but ordered "that the defendant recover no costs of the plaintiff." The refusal of a judgment for costs is the only matter now assigned as error.

WATTS, JUDGE &amp; JACKSON, for appellant.

J. W. SHEPHERD, *contra*.



R. W. WALKER, J.—The proceedings in this case were exceedingly informal. But we think it sufficiently appears that this was intended as a prosecution, under section 1172 of the Code, by the apportioner, in the name of, and for the benefit of the county. In such a case, the apportioner who makes the return, and on whose complaint the summons is issued, ought not to be held responsible for the costs.

Judgment affirmed.

## REAVES AND WIFE vs. GARRETT'S ADM'R.

[BILL IN EQUITY BY WIFE, AGAINST HUSBAND'S ADMINISTRATOR, FOR RECOVERY OF PROPERTY BELONGING TO SEPARATE ESTATE.]

1. *Election by legatee.*—Where slaves belonging to the wife's separate estate, together with other property, are bequeathed by her husband to her, during life or widowhood, with remainder to another, she cannot take both under and against the will, but will be compelled to elect.
2. *What constitutes election.*—In such case, an election to take under the will will not be implied from the facts, that the widow propounded her husband's will for probate, qualified as executrix, acted in that capacity for about fifteen months, returned the slaves in her inventory of the estate, charged herself in an annual settlement with their appraised value, kept possession of all the property until her resignation as executrix, and once declared that she intended to abide by the will, notwithstanding she was apprised of her adverse right.
3. *Resulting trust.*—An agreement on the part of the husband, to pay for certain slaves, purchased by him at the administrator's sale of the estate of his wife's deceased father, out of his wife's distributive share of the estate, which constituted a part of her separate estate under the statutes of this State, does not constitute him a trustee for his wife, when it appears that he took the title in his own name, and that the purchase-money was afterwards paid by the wife, as his executrix, out of her distributive share.
4. *Jurisdiction of chancery and probate courts over settlement of decedent's estate.*—When the disbursements of an executor exceed the amount of his receipts, the probate court has no jurisdiction, on final settlement of his accounts, to render a decree in his favor for the excess; but the chancery court will grant him relief in such case, and this without requiring him first to surrender, under the decree of the probate court, property in his hands belonging to the estate.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THE material facts of this case, as disclosed by the bill, answer, and testimony, may be thus stated :

Jane F. Garrett, the daughter of John Garrett, was married to Nathan B. Garrett in September, 1841, in this State. At the fall term, 1851, of the circuit court of Chambers, Nathan Garrett obtained a judgment against John Garrett, in an action of trover for the conversion of slaves, for more than \$1,000; and in compromise and satisfaction of this judgment, as well as in consideration of natural love and affection for his daughter, John Garrett conveyed by deed, on the 15th November, 1851, to the said Nathan B. Garrett, as trustee for his said wife, "for her sole and separate use and behoof during her natural life, and at her death for the sole and separate use and behoof of the heirs of her body," two slaves, Henry and Malinda, and delivered possession of said slaves to the said Nathan B. Garrett. John Garrett died, intestate, in November, 1852, possessed of a considerable estate. At the sale of the personal property belonging to his estate, Nathan B. Garrett became the purchaser of three negroes, and executed his note for the purchase-money, under an agreement with the administrators that he would receive this note in part payment of his wife's distributive share of the estate; but he afterwards died, about the 1st January, 1856, without having had a settlement with the administrators. By his last will and testament, which was propounded for probate by his widow, who also qualified as sole executrix, said Nathan devised and bequeathed all his property, including the negro Henry above mentioned, to his widow, during life or widowhood; and further provided, that in the event of her marrying again, the property should be equally divided between her and their five children. Mrs. Garrett continued to act as executrix of her deceased husband for about fifteen months; returned to the probate court an inventory of his estate, including the negro Henry and the slaves purchased at the sale of her deceased father's estate; paid her testator's

note for these slaves, and took a receipt from the administrators, expressing therein that she made the payment as executrix, "by receipting for that amount of her distributive share of the estate of John Garrett, her father;" made an annual settlement of her executorship in March, 1857, charging herself in her account-current with all the slaves and other property, but not claiming as a voucher the note paid to her father's administrators; resigned her trust as executrix on the 16th April, 1857; and, in August next thereafter, made a final settlement of her trust, by which it was ascertained that her disbursements exceeded her receipts by about \$188, and she was ordered to deliver over to her successor in the administration all the personal property, notes, accounts, &c., in her possession belonging to the estate.

On the 11th November, 1857, Mrs. Garrett filed her bill against the administrator *de bonis non* of her said husband; claiming as her separate estate the two negroes, Henry and Malinda, and also the other negroes purchased by her husband at the sale of John Garrett's estate; alleging her ignorance of the existence of the deed from John Garrett, until she discovered it among her husband's papers after his death; praying that the slaves might be declared to be her separate property, that the defendant might be compelled to account for their hire and profits during the life of her husband, and adding the general prayer for other and further relief. On the marriage of Mrs. Garrett with John Reaves, pending the suit, her said husband was made a co-plaintiff with her. The defendant filed an answer, insisting that the complainant never had any interest whatever in the slaves purchased by her deceased husband at the sale of John Garrett's estate, and that she was estopped by her acts from asserting any claim to the two slaves conveyed by the deed of John Garrett.

On final hearing, on pleadings and proof, the chancellor held that the complainant was not estopped from asserting her title to the slave Henry, and offered also to render a decree in her favor for the excess of her disbursements over her receipts as executrix, on her surrendering



to the defendant, under the decree of the probate court, all the other property which she had retained in her possession; and on her declining to comply with this intimation, dismissed the bill without prejudice. The chancellor's decree is assigned as error in this court.

RICHARDS & FALKNER, for appellant.

BROCK & BARNES, *contra*.

A. J. WALKER, C. J.—Mrs. Garrett, (now the wife of complainant Reaves,) under the deed of John Garrett, made in 1851, took a separate estate, for her life at least, in the two slaves, Henry and Malinda. Whether she took a larger estate, is a question which has not been considered by counsel, and it is not indispensable for us to decide it. By agreement, all claim, so far as Malinda is concerned, is abandoned. The will of Mrs. Garrett's deceased husband, made after 1851, bequeaths all the testator's property to her, during her life or widowhood; and Henry is specified as a part of the property bequeathed. In the contingency of Mrs. Garrett's marriage, a division *per capita* of the entire property, including Henry, between her and the testator's children, is directed. The will thus bequeaths an interest in Mrs. Garrett's slave Henry, to take effect on her marriage, to others. The case is therefore presented, in which an interest in Mrs. Garrett's property, belonging to her by a title independent of the will, is bequeathed to others, while she herself is a legatee and devisee under the will. She cannot take the interest in her property which has been bequeathed to others by the will, and also take under the will all that is bequeathed to her besides her own property. A case for an election is clearly presented.—1 Leading Cases in Eq. (notes to Noyes v. Mordaunt, and Streatfield v. Streatfield,) 223 to 321; 2 Story's Eq. Jur. §§ 1076, 1082-3-4, 1093; 2 Lomax on Ex'rs, 282, 288, (m. p.) 164, 165, 167; 2 Roper on Leg. 1566, *et seq.*; Wilson v. Townsend, 2 Vesey, 693.

[2.] There being a case for an election, it is contended for the defendant, that Mrs. Garrett has made her election to take under the will, and is now precluded from

setting up her independent right to the slave Henry. The facts from which it is sought to imply her election are, that she propounded the will for probate; qualified and acted as executrix; returned an inventory of the estate, including the slave Henry; charged herself in an annual settlement with the appraised value of the slave, and kept the property of the estate in possession, from the testator's death to her resignation as executrix, a period of about fifteen and a half months; and said in conversation at one time, that she intended to abide by the will, notwithstanding she was apprised of her independent right. Do these facts constitute an election by Mrs. Garrett?

What acts of acceptance or acquiescence constitute an implied election, must be decided rather by the circumstances of each case, than by any general principle. The questions to be considered are, whether the parties acting or acquiescing were cognizant of their rights; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether, on the principle "*interest reipublicæ ut sit finis litium*," these inquiries are precluded by lapse of time. Swanston's note to Dillon v. Parker, 1 Swanst. 381; 2 Story's Eq. Jur., § 1097; 2 Roper on Leg. 1653. An election can only be implied from plain and unequivocal acts, under a full knowledge of all the circumstances, and of the parties' rights.—Duncan v. Duncan, 2 Yates, 302; Cauffman v. Cauffman, 17 S. & R. 25. It is not sufficient that there should be an intention to elect; and loose conversations, expressive of such an intention, are not to be weighed in determining the question.—English v. English, 2 Green's Ch. 510. This principle deprives of all importance the declarations proved to have been made by Mrs. Garrett, except so far as they go to show her knowledge of her title. One is never bound to make an election, until fully informed of all the circumstances necessary to a judicious and discriminating choice; and if an election should be made in the absence of such knowledge, it will, as a general rule, not be obligatory. 1 Leading Cases in Eq. 320-1; Pinckney v. Pinckney,

2 Rich. Eq. 237; Clay v. Craig & Hart, 7 Dana, 6; 2 Stor. Eq. Jur., § 1098.

The will conveyed other property than that which belonged to Mrs. Garrett. There was, therefore, in the fact that Mrs. G. procured the admission of the will to probate, and qualified as executrix under it, nothing which is inconsistent with her claim to the slave Henry. The inclusion of the slave in the inventory, and the representation of him in her annual settlement as a part of the estate, and the possession of the entire property of the estate up to Mrs. G.'s resignation, do not plainly and unequivocally speak her election. These acts may have all been done by her in her capacity of executrix. There is nothing which clearly shows that she ever asserted any right to any of the property as legatee and devisee. Up to the time of her resignation, the period for the presentation of claims against the estate had not expired. It is not likely that she knew, or could have ascertained with accuracy, the value of the estate, until that period expired. Until she was so informed, she was not bound to make an election; and the courts would be extremely slow to imply an election. Upon the facts before us, we cannot affirm that the complainant has, with a full knowledge of all the circumstances necessary to enable her to make a discriminating and judicious choice, elected to take under the will. The adjudged cases would not justify the implication of an election from such facts as are before us.—Wake v. Wake, 3 Brown's C. C. 255; Hall v. Hall, 2 McCord's Ch. 280; Driscoll v. Koger, 2 Des. 295; Upshaw v. Upshaw, 2 Hen. & Munf. 381; Pinckney v. Pinckney, 2 Rich. Eq. 218; English v. English, 2 Green's Ch. 507; Dillon v. Parker, 1 Swanst. 359, 380.

It may be, that Mrs. Garrett, during the fifteen and a half months of her possession, held the property of the estate in her capacity of devisee and legatee, and, during that time, took to herself individually the use and accruing profits, without in anywise accounting therefor. But, if such facts exist, the *onus* was upon the defendant of showing them. The election was a defense brought forward by him; and it will not be inferred in the absence of the



testimony necessary to authorize the inference. We have carefully considered the testimony, especially the agreed state of facts; and while we are led to doubt whether Mrs. Garrett did not receive and enjoy as legatee and devisee the property of the estate up to her resignation, without accounting for the same; yet, we are not satisfactorily convinced by the testimony that she did. If it had appeared that she so received and enjoyed the property, and the profits thereof, and never accounted therefor, we should decide that she was precluded from claiming the slave Henry adversely to the will, or otherwise than under the will, until she had restored, or offered to restore, all that she had received under it; and the authorities would fully sustain the decision. Under such decision, a decree against the complainants, as to the slave Harry, would be inevitable; for the bill contains no offer of restoration.—*Cauffman v. Cauffman*, 17 S. & R., 25; *Wilson v. Hayne*, Cheves, 41; *Leonard v. Crommelin*, 1 Edw. Ch. 207; *Butrick v. Brodhurst*, 3 Brown's Ch. 88; *Upshaw v. Upshaw*, 2 H. & M. 390; *Stark v. Hunton*, 1 Sax. Ch. 227.

[3.] The agreement of Mrs. Garrett's former husband in his life-time, to pay for the property purchased at the sale of the estate of Mrs. G.'s deceased father, out of her distributive share, is the only one of the facts proved upon which she predicates her claim to that property. The property was purchased by her husband, and the title seems to have been taken to himself. The simple agreement to pay out of Mrs. Garrett's property would not have been sufficient to have constituted the purchaser a trustee for her.—*Danforth v. Herbert*, 33 Ala. 497. Mrs. Garrett, therefore, had no claim to the other property besides Henry and Malinda, which is mentioned in her bill, except under the will.

[4.] The distributive share of Mrs. Garrett in her father's estate was her separate estate under our statutes. Her husband made a contract to pay out of it for the property purchased by him. His wife, being the executrix of his will, fulfilled his contract, and paid the debt out of her distributive share in her father's estate.

The probate court, upon her final settlement, could not render a judgment in her favor for this and the other sum due her for the excess of her disbursements above her receipts.—*Brazier v. King*, 16 Ala. 733; *Jones v. Jemison*, 4 Ala. 632; *Kidd v. Porter*, 13 Ala. 91. For those sums, the chancery court had jurisdiction to render a decree in her favor. Her liability for the detention of the property was a separate and independent matter; and her doing justice in reference to that was not a necessary condition precedent to her obtaining justice in reference to the money due her.

The decree of the chancellor is reversed, and the cause remanded.

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## NELSON vs. GOREE'S ADM'R.

[CONTEST BETWEEN REPRESENTATIVES OF DECEASED HUSBAND AND WIFE, RESPECTING PROCEEDS OF SALE OF COTTON RAISED ON WIFE'S LANDS.]

1. *When interpleader lies at law.*—In an action by the husband's administrator against his commission-merchants to recover the proceeds of cotton shipped by the husband, and sold in his life-time, the defendants cannot, under section 2144 of the Code, ask the substitution of the wife's personal representative and distributee as a defendant in their stead; and although a different rule might possibly prevail, as to the proceeds of cotton received by the defendants after the husband's death, and sold by agreement between the respective representatives of the husband and wife; yet, if the action is brought to recover the entire proceeds of both sales, there can be no interpleader at all, since it is not permissible to divide the action into two distinct suits.
2. *Waiver of objection to irregular interpleader.*—If the plaintiff fails to object to the order of substitution at the time it is made, he cannot afterwards claim any advantage on account of its being irregular, or unauthorized.
3. *Conflict of laws as to respective rights of husband and wife in real and personal property.*—The respective rights of husband and wife, in and to lands situated in Mississippi, under a conveyance executed in Alabama, where all the parties to the deed then resided, are to be determined by the laws of Mississippi; but, as to slaves and personal property conveyed by the same deed, their rights are to be determined, as between themselves, by the laws of Alabama.

4. *Authority of foreign adjudged cases.*—Where the statutes of another State, but not the decisions of its courts construing those statutes, are offered in evidence in the courts of this State, our courts will consult those decisions to aid them in arriving at correct conclusions as to the construction of such foreign statutes, but will not regard them as binding and authoritative expositions of those statutes.
5. *Husband's rights in wife's real estate.*—Under the laws of Mississippi, (Hutchinson's Miss. Code, 496-8,) the husband becomes tenant by the curtesy in lands conveyed to his wife during coverture, on the birth of issue and subsequent death of the wife.
6. *Authority of father as natural guardian of child.*—A father has, as natural guardian of his infant child, no authority over the estate or effects of the child.
7. *Confusion of goods.*—It was contended in this case, that the plaintiff, having mingled his own goods with the defendant's, could not recover at all; but the court, after citing the authorities bearing on the doctrine of confusion of goods, placed its decision on another ground.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon C. W. RAPIER.

THIS action was brought by L. N. Walthall, as the administrator of Robert T. Goree, deceased, against Marrast & Lee, commission-merchants in Mobile, to recover the sum of \$1804 57, "the balance of the proceeds of one hundred and fourteen bales of cotton, sold by defendants as the factors of, and for and on account of said Robert T. Goree in his life-time;" and was commenced on the 29th April, 1858. At the next ensuing term of the court, on the application of the defendants, A. S. Nelson, who was the administrator of Mrs. Caroline M. Goree, deceased, (the wife of plaintiff's intestate,) and also the guardian of Caroline N. Goree, (only infant daughter of said Robert T. and Caroline M. Goree, deceased,) was substituted as a defendant in their stead; and this was done without objection on the part of the plaintiff, so far as the record discloses. At the same term of the court, by agreement between the plaintiff and the substituted defendant, the cause was submitted to the decision of the court, on the following agreed facts:

"Robert T. Goree, the plaintiff's intestate, married Caroline M. Nelson, the daughter of John Nelson, in Greene county, in Alabama, in October, 1852. They were all then residents of, and domiciled in the State of



Alabama, and so continued until their respective deaths, as hereinafter stated. On the 8th September, 1854, the said John Nelson, by deed bearing date that day, gave to his daughter, the said Caroline M., certain lands situated in Monroe county, Mississippi, for the time, and in the manner specified in said deed, a copy of which, marked 'A,' is hereto attached as a part of this agreed case; and on the same day, by another deed bearing date on that day, and duly recorded, the said John Nelson gave to his said daughter, and to his son, Gideon E. Nelson, certain slaves then on said lands in Mississippi, in the proportion and manner, and for the time specified in said deed, a copy of which, marked 'B,' is hereto attached as a part of this agreed case. On the same day, and by deed of that date, duly recorded, the said John Nelson gave to his said son, Gideon E. Nelson, an undivided one-third interest in a tract of land in said Monroe county, Mississippi; a copy of which deed, marked 'C,' is hereto attached as a part of this agreed case. Under and by virtue of these several deeds, the said Robert T. Goree, as the husband of the said Caroline M., and the said Gideon E. Nelson, took the possession, control and management of said lands and slaves.

"John Nelson died on or about the 6th day of March, 1855. Caroline M. Goree died in Alabama, intestate, on the 29th October, 1856, leaving surviving her, her said husband, Robert T. Goree, and one child, named Caroline N. Goree, now an infant under fourteen years of age. On the 21st July, 1855, before the death of the said Caroline M., the said Gideon E. Nelson, by deed of that date duly recorded, conveyed to the said Caroline M. his interest in said lands and slaves, as shown by said deed, a copy of which, marked 'D,' is hereto attached as a part of this agreed case. The said Robert T. Goree did not, nor did any one else during his life-time, qualify as the administrator of the estate of his deceased wife, or as guardian of their said infant child, either in Alabama, or in Mississippi; but the said Robert T., after the death of his said wife, continued in the control, possession and management of said lands and slaves, up to the time of his death.

The said Robert T. Goree died in Alabama, on the 22d January, 1858, intestate; and the plaintiff has since been duly appointed his administrator. Before the commencement of this suit, the defendant, A. S. Nelson, was duly appointed and qualified as administrator of the estate of Mrs. Caroline M. Goree, deceased, and also as guardian of the said infant, Caroline N. Goree, both in Alabama and in Mississippi.

“ During the year 1857, a crop of cotton was made by said slaves on said lands in Mississippi, under the orders, management and control of said Robert T. Goree, who caused one hundred and fourteen bales of said cotton to be shipped to Marrast & Lee, the original defendants in this suit, who were his factors and commission-merchants in Mobile, for sale on his account. They had paid and advanced to said Robert T. Goree, on account of said cotton, various sums of money, amounting in all, with interest, to the sum of \$3,215 32. Ninety-six bales of said cotton were received and sold by said Marrast & Lee, in the life-time of said Robert T. Goree, for the net sum of \$4,167 05. Eighteen bales, being the residue of said cotton, were shipped to said Marrast & Lee on the day before the death of said Robert T. Goree, but were not received or sold by them until after his death. This last mentioned cotton was afterwards sold by Marrast & Lee, in Mobile, Alabama, for the net sum of \$872 84; and after deducting the expenses and commissions, and the moneys paid and advanced to the said Robert T. Goree, from the proceeds of sale of said cotton, there remained in the hands of said Marrast & Lee the sum of \$1,824 57, balance of moneys received for said cotton, as shown by the account marked ‘E,’ which is hereto annexed as a part of this agreed case, and which is referred to as showing the dates, sales, charges and payments therein set forth. Before the sale of said last mentioned cotton, and after the appointment of said A. S. Nelson as administrator and guardian as aforesaid, he claimed and demanded of said Marrast & Lee the said cotton and its proceeds, and also the proceeds of the cotton first received and sold by them as aforesaid; and the plaintiff, after his appointment as

administrator of said Robert T. Goree, also claimed and demanded of them the proceeds of the sales of said cotton. Said Marrast & Lee refused to pay over to the plaintiff the said balance of the proceeds of said cotton, because it was claimed of them, adversely to the plaintiff, by the said A. S. Nelson as aforesaid; and the last lot of cotton was sold by them by consent of both said Walthall and Nelson. This action is brought to recover said sum of \$1,824 57.

"It is further agreed, that the statute laws of Mississippi, as printed in any volume published under the authority of the State, so far as the same can affect the rights of the parties to this suit, are to be considered as a part of this agreed case, and, as such, may be read from any volume published by authority of said State.

"If, upon these facts, the plaintiff is entitled to said money, or any part thereof, judgment is to be entered for him for said money, if he be entitled to the whole of it, or for such part of it as he may be entitled to; but, if the plaintiff is not entitled to any part of said money, judgment is to be entered for the defendant for the whole of it, or for such part thereof as the plaintiff may not be entitled to."

The first deed from John Nelson, above referred to as exhibit "A," dated the 8th September, 1854, conveyed to Mrs. Caroline M. Goree, "for her own sole and separate use, support and benefit, for and during her natural life, and after her death to such child or children as she shall leave surviving her," the east half of section 23, and an undivided two-thirds part of section 17, in township 12, range 6, east, lying in Monroe county, Mississippi. The second deed of the same date, referred to as exhibit "B," conveyed about forty-six negroes, together with the future increase of the females thereof, to Gideon E. Nelson and Mrs. Caroline M. Goree, "in the following proportion, to-wit: one-third part thereof in value, and not in number, to the said Gideon E., and two-thirds thereof in value, but not in number, to the said Caroline M., to and for her sole and separate use, support and maintenance, for and during her natural life, and at her death to



her children, or such child as she shall leave surviving her;" "to be controlled and managed by the said Robert T. Goree, in trust for the use and benefit of the said Caroline M., for and during her natural life." The third deed of the same date, referred to as exhibit "C," conveyed to Gideon E. Nelson, the grantor's son, an undivided one-third part of said section 17 mentioned in the first deed; and the fourth deed, referred to as exhibit "D," is a conveyance from said Gideon E. Nelson and wife to Mrs. Caroline N. Goree, dated the 1st July, 1855, for an undivided one-third interest in said section 17, together with the slaves and personal property on the plantation of which it formed a part.

On these facts, the court rendered judgment for the plaintiff, for the entire amount in controversy; and its judgment is here assigned as error.

WM. G. JONES, for the appellant.—1. On the death of Mrs. Goree, 29th October, 1856, her life estate in the lands and slaves conveyed by her father's deeds terminated, and they instantly vested in her child, Caroline N. Goree. From that day, Robert T. Goree had no interest in them.

2. Under the laws of Mississippi, the undivided third of the land and slaves conveyed to Mrs. Goree by Gideon E. Nelson became her separate estate. Upon her death, the right to the negroes was in abeyance until an administrator of her estate was appointed, and they then vested in him. Robert T. Goree became tenant by the curtesy as to the undivided third of the lands conveyed by Gideon Nelson's deed.—For the laws of Mississippi then in force, see Hutchinson's Miss. Code, 496–98.

3. As to the lands and slaves which instantly passed to Mrs. Goree's child on her death, Robert F. Goree, in taking control of them without qualifying as guardian, was, in law, a mere trespasser, and liable to the guardian whenever one was appointed. If it be said that he was guardian by nature, that would only be in Alabama, where the person of the child was; and a guardian by nature only has a right to the custody of the minor's

person, and no right to hold or manage his property. 2 Kent's Com. 228; *et seq.*

4. Under the laws of Mississippi, cited above, the undivided third of the negroes conveyed by Gideon E. Nelson also passed to the child; or, if it was necessary that they should pass through an administration on Mrs. Goree's estate, the title to them was in abeyance until the appointment of the defendant as administrator. In holding possession of them, Goree was either a trespasser, or, at best, an executor *de son tort*; and in the latter character he is liable to an administrator subsequently appointed. 1 Lomax on Executors, 70, 89; Code, §§ 1928, 1933; Carpenter v. Going, 20 Ala. 587.

5. If Goree, as tenant by the curtesy of an undivided third of the lands, had an interest in the cotton made; yet, having mingled his own with the cotton which unquestionably belonged to the child, because raised on the lands of the child, and with the labor of slaves belonging to the child, he must lose all, unless he can clearly separate his own; it is a clear case of confusion of goods. 2 Kent's Com. 436-37. The facts show that Goree received more than one-third of the proceeds in his lifetime; the child should certainly have the residue.

6. The court below gave judgment for the plaintiff, on the ground that Marrast & Lee, having received the cotton from Goree, could not dispute the right of his administrator, nor maintain a bill of interpleader under the circumstances. There are several answers to this position. In the first place, section 2144 of the Code is remedial, and should receive a liberal construction, so as to advance the remedy. Its terms clearly embrace such a case as this, and there is nothing to restrict its operation to cases in which a bill of interpleader would previously lie. 2 Story's Equity, §§ 820, 823. In the next place, if the position be correct, the proper mode and time of raising the objection was when Marrast & Lee moved to be discharged, and that Nelson be substituted as a defendant in their stead. By failing to object to the order of substitution, and accepting and treating with Nelson as defendant, the plaintiff cannot now be heard to say that

he ought not to have been brought in. Moreover, if Nelson was not properly made a defendant, the judgment against him is erroneous for that reason, and ought to be reversed. In the third place, it is submitted that a bill of interpleader would lie, particularly as to the proceeds of the eighteen bales of cotton.—2 Story's Equity, § 801. If Goree held the cotton as guardian or agent of his child, and so sent it to Marrast & Lee, it is clearly a case for interpleader.

DANIEL CHANDLER, *contra*.—1. Section 2144 of the Code was intended to give a summary remedy to a party who could file a bill of interpleader; a remedy at law, speedy and cheap, instead of a protracted and expensive remedy in chancery.—Willard's Equity, 316. This being the case, the substituted defendant is subject only to the same liabilities, and entitled only to the same defenses as the original defendant. The failure to object to the order of substitution cannot affect this principle; it can neither diminish the rights of the plaintiff, nor increase the rights of the defendant who is substituted.

2. Parties who stand in a fiduciary relation to each other cannot interplead. To do so, they must be indifferent—bound to neither party by any contract, express or implied. It is the duty of the agent to respond to the demand of his principal, to pay over to him his money; and if any other person has a claim to it, he must go upon the principal, and not upon the agent.—Willard's Equity, 316; 11 Paige, 366; 12 Barbour, 456; Russell on Factors, (48 L. L.) 279. Under these authorities, it was the duty of Marrast & Lee to pay over the proceeds of the cotton to Goree, from whom they received it, or to his administrator; and they have nothing to do with the claim of a stranger. If Goree's administrator and a stranger had each demanded the money of them, they could not have asked a court of equity to assist, direct, or relieve them. Their only duty is to comply with their contract, and from this the court could not relieve them. Willard's Equity, 318; 2 Story's Equity, §§ 816-17; 11 Paige, 376; 7 Mees. & W. 215; 14 *ib.* 800.



3. Goree had an interest in the property, and a right to retain the possession of the land and negroes, and to make a crop and sell it; and he or his administrator is entitled to the money. He was not acting in his own wrong, and was not a trespasser on the rights of others.

4. Under the law of Mississippi, Goree had an undivided interest in the lands and negroes given to his wife. Revised Code of Miss. art. 28. This being the case, he had a right to manage the property.—3 How. (Miss.) Rep. 394.

5. A court of law cannot ascertain and separate Goree's interest under this deed from that of his wife's estate. There are debts to be paid, accounts to be settled, and conflicting interests to be adjusted; and a court of equity is alone competent to do these things.

6. The appellant is not without his remedy. In another proceeding against Goree's administrator, he may recover his share of the proceeds of the cotton; but it is confidently submitted that he cannot recover it in this action.

STONE, J.—Section 2144 of the Code reads as follows: "A defendant, against whom an action is pending upon any contract for the payment of money, may, at any time before issue joined, make affidavit in writing, that a person not a party to the action, and without collusion with him, claims the money in controversy, and deposit the money in court, praying an order that the person so claiming the money be substituted in his place. The court must thereupon direct notice to be given to the claimant of the money and the plaintiff, and may, in its discretion, after such notice has been served, make the order prayed for; and thereupon the substituted defendant stands in the place of the original defendant, and the latter is discharged from liability."

For appellee it is contended, that inasmuch as the sum of money which is the subject of this suit is the proceeds of cotton which Mr. Goree, in his life-time, had consigned to Messrs. Marrast & Lee, as his commission-merchants, and the money was in the hands of said commission-merchants as the agents of Mr. Goree, that the substituted

defendant, Mr. Nelson, can not make to this action any defense which Marrast & Lee could not have made, and that Marrast & Lee were estopped from setting up against their principal, Mr. Goree, any outstanding title in a third person.

This record nowhere discloses that the plaintiff interposed any objection in the court below to the substitution of Mr. Nelson for Messrs. Marrast & Lee, as defendant in this case. No exception was taken to the action of the court, which resulted in the dismissal from the record of the former defendants, and the formation of a new issue or suit, between Mr. Goree's administrator as plaintiff, and Mr. Nelson, as administrator of Mrs. Goree, and as guardian of the infant, Caroline N. Goree, as defendant. After this change of parties had taken place, the parties submitted their cause upon an agreed statement of facts, and a judgment was rendered by the circuit court. The record does not inform us upon what ground the judgment of the circuit court was rendered. We propose, in the first place, to construe the section of the Code above copied, and to define, so far as the wants of this case render it necessary, the practice to be pursued under said section.

Our labors in this connection are much alleviated by the fact, that we are not pioneers in an unexplored region. In the State of New York there is a statute, of which ours, so far as the question in this cause is concerned, is almost a literal copy. Its language is as follows :

“ § 122. A defendant, against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct ; and the court may, in its

discretion, make the order."—Voorhies' New York Code, (5th ed.) 93; Willard's Eq. 315.

In the case of *Sherman v. Partridge*, 11 How. Pr. Rep. 154, Justice Duer, in delivering the opinion of the court, said: "The provisions in section 122 of the Code are founded upon the English statutes, 1st and 2d Will. IV, ch. 58." We have not access to the English statute, and hence must rely on the reference in Judge Duer's opinion for its contents.

In the case of *Sherman v. Partridge*, 11 How. Pr. Rep. 154, (S. C., 1 Abbott's Pr. Rep. 256,) the plaintiffs brought suit against defendants, and alleged that one Searle had sold logwood to the defendants, at the price and value of five hundred dollars; and that Searle, for a valuable consideration, had assigned and transferred to plaintiffs his said claim against defendants; and that in consideration of said assignment, the defendants had expressly promised to pay the plaintiffs the amount they owed Searle. One of the defendants submitted an affidavit, stating that one Delafield, a person not a party to the action, and without collusion with the defendants, demanded of them the proceeds of the logwood, alleging that it belonged to him, and that Searle had not the possession as owner, nor any right or authority to sell the same or assign the price thereof. The motion was, to discharge the defendants, and to substitute Delafield in their stead.

On the trial of the motion, it appeared that the defendants had received the logwood from Searle; and that Searle, afterwards, for a valuable consideration, had transferred the claim to plaintiffs, and that defendants had promised the plaintiffs to pay them. The court overruled the motion to substitute, saying, among other things, "An order of interpleader, under section 122 of the Code, can only be properly made where the whole controversy turns upon the right of property—that is, upon the question whether the plaintiff in the suit, or the claimant whose substitution as the defendant is desired, is the true owner of the debt, fund, or other property for which judgment is demanded. When the plaintiff insists, as in the present case, that the defendant, by a personal contract or other-



wise, has rendered himself liable in all events for the debt sought to be recovered, and is precluded from setting up the title of a third person as a bar, it would be manifestly unjust to make the order, since it would deprive the plaintiff of his legal remedy, and might involve the sacrifice of his legal rights, without affording him any equivalent or compensation. \* \* \* Nor is it only upon the ground that has been stated that I must refuse, by substituting Delafield, to discharge the defendants. Had this action been brought by Searle himself, or by the plaintiffs merely as assignees, I must still have said that the facts do not exhibit a case for an interpleader under a just construction of the Code. The plaintiffs seek to recover a debt arising upon contract; but Delafield is not 'a third person, nor a party to the suit making a demand for the *same debt*,' as the words of the Code require him to be, to justify an order for his substitution. As he denies that Searle had any authority to make the sale, his demand as owner is for the logwood itself, or its value, which may be greater or less than the price agreed to be paid; and at any rate, is not a debt, of which, as such, he may compel the payment." He then proceeded to state that the words of the English statute do not at all differ in meaning from those found in section 122 of the New York Code.

The English statute of 1st and 2d William IV., ch. 58, has been frequently construed; and the opinions of the English judges fully sustain those copied above from the opinion of Judge Duer.—See *Lindsey v. Barron*, 6 Man., Gr. & Scott, (60 Eng. Com. Law,) 291; *Palonic v. Campbell*, 2 Dowl. N. S. 397; *Slaney v. Sidney*, 14 Mees. & Wels. 800; also, *Chamberlain v. O'Connor*, 8 Howard's Prac. 45.

The authorities place the practice under the interpleader statutes in England and New York on the same principles as those which govern that remedy in equity. In Willard's Equity, pp. 313, *et seq.*, this subject is treated in connection with the New York statute; and it is obviously the opinion of that writer, that the statute, while it is in some respects less comprehensive than the remedy

by bill of interpleader in equity, is, in the matter we have been discussing, governed by the rules which uniformly obtain in the chancery court. Under those rules, Messrs. Marrast & Lee, as to the proceeds of the cotton sold before the death of Mr. Goree, could not have maintained a bill of interpleader; and hence had no authority to demand that Mr. Nelson should be substituted in their stead, as defendant in this action.—*Gibson v. Goldthwaite*, 7 Ala. 281; *Marvin v. Elwood*, 11 Paige, 365; *Costigan v. Newland*, 12 Barb. Sup. Ct. 456; *Crawshat v. Thornton*, 2 Myl. & Cr. 1; *Croskey v. Mills*, 1 Cr. Mees. & Ros. 298.

As to the eighteen bales of cotton received and sold by Marrast & Lee after the death of Mr. Goree, probably a different rule prevails. Those bales remained in kind, and unchanged in the hands of the bailees, until after the appointment of Mr. Walthall as administrator of Mr. Goree, and the appointment of Mr. Nelson as administrator of Mrs. Goree, and as guardian for the infant. It was then sold by Marrast & Lee, *by consent of both said Walthall and said Nelson*. In this, probably Messrs. Marrast & Lee could not with propriety be styled the agents or factors of the intestate, Mr. Goree, or of his administrator, Mr. Walthall. They were acting under the joint authority of both Walthall and Nelson. In *Pearson v. Carden*, 2 Russ. & Myl. 606, it was said, that when goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor, as to constitute or acknowledge an apparent title to them in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply.

In the present case, it seems to us that, as to the proceeds of the eighteen bales of cotton, Messrs. Marrast & Lee, under the agreement of Messrs. Walthall and Nelson, filled much more nearly the relation of stakeholder to both, than of agent to either representative. But we need not decide this question.

It being shown above that, as to a part of the money in the hands of Messrs. Marrast & Lee, they were not in condition to call on their principal to interplead; and the entire sum being sued for in one action, it was not

permissible to divide that action into two distinct suits. The order of substitution, under section 2144 of the Code, must be an entirety. In this case, the rule declared in the case of *Chamberlain v. O'Connor*, 8 How. Pr. Rep. 45, would apply.

[2.] Notwithstanding the order of substitution in this case was irregular, and should not have been granted, the appellee, by failing to object to the action of the court, has forfeited all right to claim any advantage in consequence of the order. The cases cited above show, that the proper mode and time for raising the question of the right to substitute a new defendant, is when the motion is acted on. It is not a question of what defense the substituted defendant can make, after he is, by the order of the court, admitted into the place of the original defendant; but a question of right in the original defendant to have him substituted. When he becomes the defendant, he defends, not on the title of the original defendant, but on his own title. This is fully shown in the reasoning of Judge Duer *supra*, and in the other cases cited.

After the defendant was changed, the parties, by entering into an agreement with each other, forming an issue, and engaging in the trial of the cause; and this without objection by the plaintiff to the previous action of the court, must be regarded and treated as submitting their several claims on the fund to the relative strength of the titles they represented.—*Bryan v. Wilson*, 27 Ala. 208; *Byrd v. McDaniel*, 26 Ala. 582; *Gager v. Gordon*, 29 Ala. 341.

It is, then, our duty to determine the relative strength of the plaintiff's and defendant's titles.

The entire real and personal property, of which the cotton in controversy is part of the product, was acquired under contracts executed in Alabama, by parties resident in Alabama, after the intermarriage of Mr. and Mrs. Goree, and after the "woman's law" became operative. Mr. and Mrs. Goree were citizens of Alabama when the deeds were made, and continued so until their several



deaths. The infant ward has always been a resident of Alabama.

The two deeds of September 8, 1854, from the elder Nelson to Mrs. Goree, conveyed property, real and personal, to her sole and separate use during her life, and at her death, to such child or children as she should leave surviving her. The deed of July 21st, 1855, from the younger Nelson to Mrs. Goree, is expressed in general words of sale, without words of exclusion. Under the deeds from the elder Nelson, Mrs. Goree acquired the east half of section 23, township 12, range 6, 320 acres, and an undivided two-thirds of section 17, same township and range; also, an undivided two-thirds of the negro property. Under the deed from the younger Nelson, she acquired the remaining third of section 17, and of the slave property. The land is in the State of Mississippi, and the slaves were also there when they were acquired; and were still there at the death of Mr. Goree, in January, 1858. The cotton sold by Messrs. Marrast & Lee was grown on said lands, by the labor of said slaves. Mr. Goree was in control of said property until his death; but neither he nor any one else had been appointed administrator of Mrs. Goree, or guardian of the infant.

[3.] Real estate, as to its enjoyment and transmission, is governed by the law of the place where it is situated. Hence, the rights of the parties in and to the lands are determined by the laws of Mississippi.—Story's Confl. of Laws, §§ 382, 483, and notes; *Smith v. Wiley*, 22 Ala. 396; *Shep. Dig.* 476, § 13. Personal property has no local habitation. It pertains to the owner, wherever he may have his domicile. Saving the paramount rights of Mississippi creditors, if such there be, the succession of the personalty and its enjoyment must be, as between these parties, determined by the laws of Alabama. *Story's Confl. of Laws*, § 383; *Turner v. Fenner*, 19 Ala. 355; *Inge v. Murphy*, 10 Ala. 885.

[4.] In regard to the lands, the extent of Mr. Goree's claim to their enjoyment, after the death of Mrs. Goree, is, under the laws of Mississippi, with us a matter of difficult solution. Their statutes, providing for the separate

estates of married women, are substantially different from ours. They are in evidence in this record, and hence we are authorized—nay, required—to regard them. Their decisions are not in evidence, and we are only authorized to consult them as other reported cases, to aid us in arriving at correct conclusions upon their statute laws. Under these circumstances, we are not permitted to regard them as authoritative and binding expositions of their statutes. *Walker v. Forbes*, 31 Ala. 9; *Bloodgood v. Grasey*, 31 Ala. 579, and authorities cited; *McArthur v. Carrie*, 32 Ala.

Another embarrassment is thrown over this question, by the circumstance that *we* limit the operation of all our statutes in relation to the separate estates of married women to such estates as are made separate by law, while we can not shut our eyes to the fact that with them the rule seems to be different.—See *Pickens v. Oliver*, 29 Ala. 528; *Smith v. Smith*, 30 Ala. 642; *Willis v. Cadenhead*, 28 Ala. 472.

A still further obstacle is encountered in the conflict observable in their reported cases. We confess a decided preference for the conclusions attained in the cases of *Marshall v. King*, 24 Miss. 85; *Lyon v. Knott*, 26 *ib.* 548; *Rabb v. Griffin*, *ib.* 579, over that announced in the later case of *Cameron v. Cameron*, 29 Miss. 112, and apparently recognized in *Bates v. Cotton*, 32 Miss. 266.

[5.] There can be no question that Mr. Goree was tenant by the curtesy of an undivided third part of section 17, township 12, range 6.—*Hutchison's Miss. Code*, 498, §§ 2, 6, and act of 1846; see, also, act of 1839, pp. 496–7, §§ 1, 2, 3. Whether he was such tenant of the east half of section 23, and the other two-thirds of section 17, we deem it unnecessary, embarrassed and cramped in our investigations as we find ourselves, now to decide.—See *Planters' Bank v. Davis*, 31 Ala. 626, and authorities in opinion and briefs; *Shep. Dig.* 476, § 13.

Under the laws of Alabama, at the death of Mrs. Caroline M. Goree, an interest equal to two-thirds of the slaves passed directly, and without administration, to the infant, Caroline N. Goree, under the deed of the elder

Nelson. As to the remaining third of the slaves, Mrs. Goree dying intestate, the title remained in abeyance until the appointment of an administrator to her estate, when the legal title vested in him, with relation back to the time of her death, as to the rights of such administrator. No title whatever, as to any of the slaves, passed to Mr. Goree. He was not, without appointment, the personal representative of his deceased wife's estate, and hence he could not take as administrator. He could not, under our law, take an interest in the personalty, as a *quasi* tenant by the curtesy.

[6.] It may be supposed that, inasmuch as Mr. Goree, on the death of Mrs. Goree, became and was the natural guardian of his infant child, Caroline N. Goree, he, as such guardian, had the right to control and manage her property; and that his estate can not, in an action at law, be brought to account for the proceeds. If Mr. Goree, as guardian, was authorized to control and direct the labor of the slaves belonging to his infant child, his estate cannot, in this action, be brought to an account.—Chapman v. Chapman, 32 Ala. 106; Vincent v. Rogers, 30 Ala. 471. The argument is at fault, however, in supposing that Mr. Goree, as father and natural guardian, had any authority over the estate or effects of his infant child. Code of Ala. § 2014; Hutch. Code of Miss. 509; Alston v. Alston, at the last term; 2 Kent's Com. m. pp. 220–1. This case, then, stands as if a mere stranger had employed these slaves in making the crop, a part of the proceeds of which is the subject of this suit. In such case, there could be no recovery, unless there is something in the fact that such stranger owned the land, or some part thereof, on which the cotton was grown.—Carpenter v. Going, 20 Ala. 587; Bailey v. Miller, 5 Ired. Law, 444; 1 Lomax on Ex'ors, 180; Code, § 1933; 1 Williams on Ex'ors, 211; Hill v. Henderson, 13 Sm. & Mar. 688.

[7.] It is contended for appellant, that the doctrine of confusion of goods applies to this case. Being, as stated above, unable to determine the extent of interest in the lands which Mr. Goree owned when this cotton was grown, we prefer not, at this time, to determine this question,



further than may be necessary to a correct result in this suit. The subject is treated in the following authorities: 2 Kent's Com. side pages 363-4-5; Lupton v. White, 15 Vesey, 432, 437; Attorney Gen. v. Fullerton, 2 Vesey & Beames, 263; Betts v. Lee, 5 Johns. 348; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Pratt v. Bryant, 2 Ver. 333; Willard v. Rice, 11 Metc. 493; Brackenridge v. Holland, 2 Blackf. 377; Hesseltine v. Stockwell, 30 Maine, 237; Bryant v. Ware, *ib.* 295; Dillingham v. Smith, *ib.* 370; Puleifer v. Paige, 32 Maine, 404; Dunning v. Stearns, 9 Barb. 630.

We stated above that the rights of these parties must depend on the relative strength of the two titles. It follows that, to maintain this action, it rests with the plaintiff to show a better title at law to the money in the estate of Mr. Goree, than there is in the estate of Mrs. Goree, and in the minor. The question thus stated is easily answered, without asserting to the extent of some of the cases cited above the doctrine of confusion of property or goods. Conceding, for the purposes of this argument, that Mr. Goree was tenant by the curtesy of the entire tract of land during the year 1857, when the cotton was grown, it is nowhere shown that Mr. Goree has not already received and enjoyed his full share of the crop of that year. This, if the rule of confusion of goods be applicable, would forbid that the present suit should be maintained.

There is another principle, however, sufficiently comprehensive for the purposes of this case, and which, we think, is decisive of the plaintiff's right to recover in this action. Waiving, for the present, all consideration of the want of authority in Mr. Goree to employ these slaves in the cultivation of his own lands—even if we place the question on the doctrine of part-ownership, or tenancy in common, it does not appear that the estate of Mr. Goree has not received its full proportion of the money for which the cotton was sold. Thus considered, Mr. Goree has received and used near \$3,000 of the money, while Mr. Nelson, in his double representative capacity, can receive by this suit less than \$2,000. It should be

borne in mind, the latter is not suing to recover money, but is defending a suit which seeks to appropriate this balance of the fund. This places the plaintiff in a legal dilemma. If the doctrine of confusion of goods apply, his intestate created the confusion, and he must suffer the consequences.—See, in addition to the authorities above, *Pearson v. Darrington*, 32 Ala. 227, 3d head-note, p. 241. If, on the other hand, it be contended that a severance of the joint ownership has been effected by the sale of the cotton, and that either party can maintain an action against the other for his or her proportion of the money, it does not appear that the intestate of the plaintiff in this action had not enjoyed more than his share. See *Perminter v. Kelly*, 18 Ala. 716.

The reasons which influence us in withholding an expression of opinion on this question of confusion of goods, are partly stated above—namely, our inability, in the state of this record, to determine satisfactorily the extent of Mr. Goree's curtesy in the lands. To this we may add, that there will probably be other differences of opinion and of claim between these parties, growing out of the cotton crop of 1857. Should such contest arise, a fuller statement of the facts, as well as the laws of Mississippi as understood and expounded in their jurisprudence, will probably be brought before the court trying the questions.

It results from what we have said above, that the judgment of the circuit court is reversed, and the cause remanded.

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### KIMBROUGH vs. DAVIS & RAND.

[ACTION ON PROMISSORY NOTE BY ASSIGNEE AGAINST MAKER.]

1. *When judgment on garnishment, with satisfaction thereof, constitutes defense to action by assignee of note.*—If the maker of a note, when garnisheed as the debtor of the payee, admits an indebtedness in his answer of less than the actual

amount due, and fails to state the fact that an action is pending against him by an assignee of the note, and suffers judgment to be rendered against him on his answer, when he could have successfully defended himself on account of the laches of the attaching creditor,—the payment and satisfaction of this judgment do not constitute a defense to the action on the note by the assignee.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by William A. Kimbrough, against John W. Davis and Walter R. Rand; was founded on the defendants' promissory note for \$500, dated 1st June, 1855, payable on the 1st March, 1857, with interest from date, to B. R. Thomas or bearer, and endorsed by said Thomas to plaintiff; and was commenced on the 10th March, 1857. The defendants pleaded, in short by consent, 1st, *non assumpsit*; 2d, payment; 3d, the rendition of several judgments against the defendant Rand, as the debtor of said Thomas, under garnishments issued by creditors of said Thomas, and the satisfaction thereof under execution. The plaintiff took issue on the first and second pleas, and replied to the third—"1st, the general replication;" 2d, "that before the rendition of said judgments against said Rand as garnishee, as set forth in said plea, to-wit, on the 10th day of March, 1857, he (said Rand) had notice that the plaintiff in this suit was the assignee of said note, and claimed the same, and yet failed and neglected, before the rendition of said judgments, to answer (?) in either of said garnishment suits the notice so received and had by him;" and, 3d, "that the judgments described in said plea were rendered after the commencement of this suit, and after the service of the writ in this case on said Rand, and that no answer or suggestion of that fact was made by said Rand in said garnishment suits before the rendition of said judgments;" and on these replications issue was joined.

On the trial, the plaintiff read in evidence the note declared on, and the defendants then read a transcript of all the proceedings had in the several garnishment suits referred to in the third plea. The opinion of the court



contains a full statement of all the proceedings in those suits, as shown by the transcript; and it is therefore unnecessary to repeat them here. "This being all the evidence in the cause," the court charged the jury as follows:

"1. That if they believed from the evidence that, after the making of the note sued on, and while it was in the hands of the payee, the defendant \*Rand was garnisheed as the debtor of the payee, and answered [to] the indebtedness here sued on, and that a judgment was rendered against him thereon, which he had paid,—this would be a full defense in this suit, although they might further believe from the evidence that, before the answer of the garnishee, and before the rendition of judgment against him, he was notified by the plaintiff that he was the owner of the note and claimed it from him, and although he failed to disclose this notice in his answer.

"2. That they were authorized to infer, in the absence of evidence to the contrary, that the note was in the hands of the payee at the time of the service of the writs of garnishment, from the fact that the note was payable to him."

The plaintiff excepted to each of these charges, and then requested the following written charges:

"1. That the jury, if they believed all the evidence, must find for the plaintiff.

"2. That if they believed from the evidence that, on the 10th March, 1857, before the rendition of the judgments against said Rand as garnishee, he had notice that the plaintiff was the owner of, and claimed the said note, and failed and neglected, before the rendition of said judgments, to answer in either of said garnishment suits the notice so received by him,—then, the said judgments with the payments thereof by him, do not constitute any defense to this suit.

"3. That if they believed from the evidence that the judgments against said Rand as garnishee were rendered after the commencement of this suit, and after the service of the writ in this case on said Rand, and that no answer or suggestion of that fact was made by said Rand in said

garnishment suits before the rendition of said judgments,—then, the rendition of said judgments, and the payment of them by the garnishee, do not constitute a good defense to this action.”

The court refused each of these charges, and the plaintiff excepted; and he now assigns as error the charges given by the court, the refusal of the charges asked, and the judgment rendered by the court.

D. W. BAINE, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

R. W. WALKER, J.—This record is so confused that it is difficult to understand it. We think, however, that the following statement embodies all the material facts of the case:

On the 1st June, 1855, the appellee, Davis, purchased of B. R. Thomas a tavern and livery-stable, and gave him in payment three promissory notes of that date, executed by himself and his co-appellee, Rand; one for \$700, due the 1st March, 1856; one for \$500, due the 1st March, 1857; and one for \$500, due the 1st March, 1858. At the fall term, 1855, of the circuit court for Wilcox county, the appellee Rand was garnisheed in three cases, by judgment creditors of Thomas, to answer what he was indebted to the latter. Hamner was the plaintiff in two, and O’Riley in one of these cases. Rand answered the garnishments, either at the fall term, 1855, or at the spring term, 1856,—it seems uncertain which; and it appears from the entries on the minutes, and from his amended answer subsequently filed, that by his original answer he admitted an indebtedness to Thomas in the sum of \$700; and his amended answer shows that the acknowledgment of indebtedness in the original answer had reference to the note for \$700, due 1st March, 1856. No objection or exception was made to this answer by either of the attaching creditors. No judgment was then rendered against the garnishee; but afterwards imperfect judgments *nunc pro tunc*, as of the fall term, 1855, were entered against him, purporting to be founded on his answer made at

that term, admitting an indebtedness of \$700. It is impossible to ascertain with certainty from the record at what term these judgments were entered. In the transcript, they appear under the date of "October 17th, 1858." But this is evidently a mistake, as the trial on which they were offered in evidence took place in April, 1858. The description of these judgments contained in the sheriff's receipt, (showing the payment of them by the garnishee,) which is set out in the bill of exceptions, leads us to conclude that they were in fact rendered on the 15th April, 1857, for that is the date assigned to them in this receipt. The receipt is dated October 16th, 1857, and shows that the aggregate amount of the three judgments in favor of Hamner and O'Riley, with interest to that date, and costs and commissions, was \$464 37; and that on that day they were paid off by the garnishee, Rand. The executions which were issued on the defective judgments referred to, were quashed on motion; but *when* this was done, whether before or after the payment by the garnishee, the record does not inform us.

On the 10th March, 1857, the appellant, to whom Thomas, the payee, had endorsed the note for \$500, due 1st March, 1857, brought suit on it against Davis and Rand. After this suit was brought, and after the garnishee, Rand, had paid off the imperfect judgments rendered against him, (as we suppose,) in April, 1857, which, as already stated, were founded upon his original answer, admitting an indebtedness to Thomas of \$700, meaning thereby the \$700 due upon the note for that amount maturing 1st March, 1856; the garnishee, on the 15th April, 1858, appeared and filed an amended answer, in which, after stating his purchase from Thomas in June, 1855, and the execution of the three notes already described, he proceeds to state that, when he made his original answer, "he answered that he was indebted to B. R. Thomas in the sum of \$700, and he believed at that time that he would not be liable on the other two notes, until the title was made by Thomas; and that in his answer he had reference to the note for \$700." He further states, that "he had been informed by Hamner, a



short time before he made his answer, that he held the note for \$700, and that said Hamner knew that deponent intended to answer an indebtedness of \$700, and that he had reference to the \$700 note. And this deponent further states, that he (Hamner) called upon deponent after the maturity of said note, and deponent paid the same, and also the costs in the suit of garnishment. And this deponent believes, and has been so informed, that Thomas held both of the last mentioned notes at the time the summons of garnishment was served upon deponent." No suggestion was made by the garnishee that suit had been brought on this note by appellant, or that any notice had ever been given him that the appellant claimed the debt. On this answer, and on the day it was filed, and at the same term when the trial of the present suit took place, judgments *nunc pro tunc*, as of the fall term, 1855, were rendered in favor of Hamner and O'Riley against the garnishee, the aggregate amount of the same being about \$666. On the trial of the suit of the appellant against Davis and Rand, the defendant relied on these judgments against the garnishee, and the payment by the latter, as a defense to the action. The only proof of payment was that furnished by the sheriff's receipt of Oct. 17th, 1857, before referred to.

It will thus be seen that the original answer of the garnishee, acknowledging an indebtedness of \$700, had reference only to the first of the three notes before mentioned; that this answer was not excepted to by the attaching creditors, but that, on the contrary, they had judgments in their favor, founded on it, entered up against the garnishee; and that, although the executions issued on these judgments were quashed, because the latter were informal and imperfect, yet the garnishee in fact paid off the judgments after the present suit was instituted by the appellant, and six months before he filed his amended answer. At the time these payments were made, the only judgments in existence against the garnishee were the informal ones subjecting the note for \$700. Moreover, for aught that appears in the record, the amended answer filed at the April term, 1858, was the voluntary

act of the garnishee, without suggestion or motion from the attaching creditors. It may be doubted whether there was in fact, at that time, any case in court against the garnishee. At all events, it is clear that he could have protected himself against a judgment in favor of the attaching creditors, subjecting in his hands anything except the debt for \$700; for, by their *laches*, he was discharged, as to them, of all but that note.—See Code, § 2546; Mock v. King, 15 Ala. 66; Goodwin v. Brooks, 6 Ala. 836; Leigh v. Smith, 5 Ala. 583.

He thus permits a judgment to be rendered against him, when it is obvious that he could have prevented it; and although the suit of the appellant was then proceeding in the same court, he wholly fails to suggest that fact to the court. The garnishee, by his amended answer, admitted his indebtedness upon the two notes for \$500 each. It appears from the evidence that the note assigned to appellant bore interest from 1st June, 1855, so that at the time the last judgments *nunc pro tunc* were rendered, the amount due on it was over \$600. The entire amount paid by the garnishee to the sheriff, on the judgments in favor of Hamner and O'Riley, as shown by the evidence, was only \$464 37. And, in any aspect of the case, it is clear that the garnishee is entitled to protection only to the extent of the payment actually made by him. An *unsatisfied* judgment, in favor of an attaching creditor, against a garnishee, is no defense to a suit brought by an assignee against the garnishee.—Cook v. Field, 3 Ala. 53.

If, at any time prior to judgment against a garnishee, he becomes aware of an assignment of his debt made before the garnishment, it is his duty to bring the fact to the attention of the court, in order that the assignee may be cited to substantiate his claim; and if the garnishee fails to inform the court of the alleged assignment, he cannot, if the debt had been in fact effectually assigned before the garnishment, avail himself of the payment of the judgment rendered against him as garnishee, in defense of an action brought by the assignee.—Colvin v. Rich, 3 Por. 175; Foster v. White, 9 Porter, 224; Johns v. Field, 5 Ala. 484; Crayton v. Clark, 11 Ala. 787; Stub-

blefield v. Haggerty, 1 Ala. 38; Dore v. Dawson, 6 Ala. 712; Smoot v. Eslava, 23 Ala. 659; Drake on Attachments, §§ 575, 576, 717, 608.

But, in a suit by the assignee of a note, against a garnishee, who received notice of the assignment before final judgment in favor of the attaching creditor was rendered against him, but who failed to bring that fact to the attention of the court, is the *onus* of proof on the assignee to show that the note was in fact assigned to him before the service of the garnishment? In the case of Camp v. Halter, 11 Ala. 151, it was held, that where the assignee of a note is cited to come in and contest with the plaintiff in attachment, it is incumbent on him to aver and prove that he was the owner of the note *before* the service of the garnishment.—See Brooks v. Hildreth, 22 Ala. 469. Whether the rule which is here held to govern in a contest between the creditor and the transferee equally applies in a suit by the endorsee against the maker, we need not now determine. For, whatever may be the decision of this question, we think that, under all the circumstances disclosed by this record, the judgments *nunc pro tunc* rendered against the garnishee, with the proof of payment, to the extent, and in the manner shown by the bill of exceptions, did not constitute a defense to the suit; but, on the contrary, that upon the evidence before the jury, (all of which is set out,) the plaintiff was entitled to recover the full amount of the note in suit. Drake on Attachments, §§ 711, 715, 630, 588; Welter v. Rucker, 1 Brod. & Bing. 490; Mills v. Stuart, 12 Ala. 90, 97; Johns v. Field, 5 Ala. 484; Seward v. Heflin, 20 Ver. 144; Myers v. Urich, 1 Binney, 25; Flower v. Parker, 3 Mason, 247.

Judgment reversed, and cause remanded.



WALKER'S HEIRS *vs.* MURPHY.

[REAL ACTION BY HEIRS-AT-LAW AGAINST PURCHASER FROM EXECUTOR.]

1. *Executor's power under will to sell realty.*—Where a testator directed that his entire estate, after the payment of his debts, should be kept together “for the support, maintenance and education” of his children; that no account or charge should be made against any of them for necessary support and education; that when either of his daughters became of age or married, she should have one-sixth part of the estate “converted into slaves, and settled upon her, to her sole and separate use;” and that as his sons severally became of age, their portions of the estate should “be paid to them in cash,”—*held*, that the executor had no power under the will to sell the entire real estate at private sale, although two of the children were in a condition at the same time to demand the payment of their respective shares.
2. *Estoppel en pais.*—The receipt by the heirs-at-law and devisees of their respective portions of the purchase-money, arising from an unauthorized sale of land by the executor, does not estop them from recovering the land in an action at law: if available at all as an estoppel, it is only in equity.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by the children, heirs-at-law and devisees of Peter Walker, deceased, against Mrs. Maria Murphy, to recover a tract of land in said county, of which said Peter Walker was seized and possessed at the time of his death, and to which the defendant derived title under a purchase at private sale from the executors of said Walker. The defendant pleaded not guilty, in short by consent, with leave to give any special matter in evidence which might constitute a good defense to the action. The facts of the case, as admitted by agreement on the trial, are thus stated in the bill of exceptions:

“Peter Walker, the plaintiffs’ ancestor, lived and died in said county of Franklin, leaving at his death six children, two sons, and four daughters. The last will and testament of said Walker, which was duly admitted to probate in said county on the 5th August, 1844, is in the following words,” &c. (See the material clauses of the will

quoted in the opinion of the court.) "Letters testamentary, on the probate of said will, were duly granted by the proper court of said county, to Clark T. Barton and Jeremiah Helmes, the executors therein named, who took on themselves the administration and execution of the duties incident to said will, and gave bond with surety as required by law. Sallie Walker, one of the testator's daughters, was of age at the time of his death; and another daughter intermarried with Thomas B. Mattingley on the 20th January, 1846. The premises sued for, of which said testator held the legal title at the time of his death, constituted his plantation, and were in cultivation by him at the time of making his will, and at his death, though he never lived on said lands. On the 6th January, 1847, the executors of said Walker sold and conveyed said lands, at private sale, on a credit of one and two years, to George W. Carroll, executor of Garret Murphy, deceased, as shown by the deed hereunto annexed. The defendant derives title to the lands sued for under said deed, by proper conveyances, and has had possession ever since said sale. The purchase-money, or proceeds of said sale, when realized by said executors, went into said Walker's estate, and were distributed on their settlement with the court in the year 1847. Two witnesses stated, that they regarded the price obtained for said land by the executors as its full value at the date of the sale; and the annual rent of the place is worth one hundred and fifty dollars. On one of the annual settlements, the estate was indebted to said executors, before said sale of land, in the sum of six hundred dollars. The testator's six children were all alive at the date of said sale, and long afterwards. Plaintiffs are the only legatees and heirs-at-law of said testator now living, and have received the proceeds of said sale of lands in distribution under said will. The administration of said estate was fully settled up by said executors before this suit was brought. The testator's youngest child was twenty-one years of age in the year 1852, and there was about two years difference between the ages of that and the next youngest, and so of the second from the youngest. Said testator left no widow.

At the time of his death, he owned slaves to the value of about \$4500, real estate valued at \$7,000, other personal property about \$2,000, and notes and accounts, with interest, amounting to about \$10,000; and owed about \$10,000. The probate of his will, the letters testamentary to his executors, their bond, final settlement, and the distributees' receipts for their respective portions of the estate, as shown by the records of the probate court, were also in evidence.

"On these facts, the court charged the jury, 'that if they believed the evidence, they might find a verdict for the defendant.' The plaintiffs excepted to this charge, and requested the court to instruct the jury, in writing, '1st, that if they believed the evidence, they might find a verdict for the plaintiffs;' '2d, that the will of Peter Walker did not confer on his executors the power to sell the lands in controversy;' '3d, that said will did not give the executors the power to sell said lands until the education of the testator's children was completed;' '4th, that said will did not give the executors power to sell said land at private sale, on a credit, and at the time, and under the circumstances shown in evidence;' and, '5th, that the executors' deed to Carroll, under the circumstances in proof, did not divest the plaintiffs' title to the lands, nor vest the legal title in said Carroll.' Each of these charges was refused by the court, and the plaintiffs excepted."

The errors assigned are, the charge given by the court, and the refusal of the several charges asked.

D. P. LEWIS, for appellant.

WM. COOPER, *contra*.

A. J. WALKER, C. J.—The executors of Peter Walker, deceased, sold the land in controversy without the authority of any court, at private sale. The sale was necessarily void, unless the will of their testator bestowed upon the executors the power to sell. The two clauses of the will bearing on the question of the power of sale are as follows: "It is my will, after paying my funeral expenses and my just debts, that my estate be kept together, for



the support, maintenance and education of my children, and that no account or charge be made against any of them for necessary support and education." "I further desire, that whenever either of my (children) daughters marry or become of age, that the one-sixth part of my estate be converted into slaves, and settled upon her, to her sole and separate use, free from any disposing power of her husband; and that as my sons severally become of age, that their portions of my estate be paid to them in cash."

Now, it is manifest that there is here, not only no grant of a power to sell the *entire* estate, but a virtual denial of such power. The testator directs that his estate be kept together, for the support, maintenance and education of his children, and that no charge be made against any of them for necessary support and education. The testator's design to keep the estate together, as the means of maintaining and educating the children, and not to have it sold, is clearly manifested in this item of the will. The next item rather confirms than conflicts with that idea. It requires that one-sixth part of the estate should be converted into slaves, upon the marriage or attainment of majority by any one of the testator's daughters; and on the attainment of majority by the sons, that their respective portions should be paid in cash. The intention of this item of the will is too clear to be mistaken. Following up the design evidenced by the preceding clause, he intended that the estate should be kept together, until the contingencies should arise in which his several daughters and sons should be entitled to their several and respective portions of one-sixth; and that in each one of those several contingencies, one-sixth part of the estate should be set apart from the rest, and converted either into slaves or money, according as the daughters or sons were to receive portions. There could be from this clause no implied power to sell any other than one-sixth part of the estate as the contingencies arose; and that would be a sixth part previously separated and distinguished for that purpose. If two of the children were at the same time in a condition to demand the payment of their shares,

there could be no authority for the sale of more than two sixths of the estate.

The authorities cited and referred to by the counsel for the appellee do not justify any implication of authority to sell the entire estate upon the occurrence of any one or two of the contingencies. It is clear that such a sale would defeat the testator's manifest intent and purpose. This will be plain, if the inquiry be made, how could the estate be kept together, for the support, maintenance and education of the children, if upon the first marriage or attainment of majority the entire estate should be sold. It may have been more convenient and expedient to sell the entire estate, than to have sold a sufficiency to pay the several portions of the children, as they became respectively entitled to them. That might have been a ground for an application to the chancery court, not for a private sale by the executors. It would be a violation of the intention of the testator for the executor to make any sale except of a portion set apart and distinguished to meet the claims of the children, as the contingencies upon which their right to the possession of their shares accrued.

The decision in *Winston v. James & Haigh*, 6 Ala. 550, asserts the doctrine, that "no precise forms of words is necessary to the creation of a power (of sale). If the intention to confer the power is apparent, to enable the executor to execute the trusts of the will, the power will be implied." Neither that case, which is upon a will of widely different language, nor the principle above extracted, can avail the appellee; for the exercise of the power of sale here would defeat, instead of enabling the executor to execute the trusts of the will.

[2.] A parol estoppel never operates a transfer of the legal title to land. If there was an estoppel in this case, by the receipt of their respective shares of the purchase-money of the land by the children, it is available only in equity.—*McPherson v. Walters*, 16 Ala. 714; *Smith v. Munday*, 18 Ala. 182; *Day v. Rowland*, 17 Ala. 681.

The judgment of the court below is reversed, and the cause remanded.

## PIERCE vs. WILSON.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT ON GROUND OF FRAUD.]

1. *When equity will rescind contract on account of fraud.*—A contract for the sale of the patent right to make, use and vend, within a specified territory, an improved kind of loom, will be rescinded in equity, on the timely application of the purchaser, on proof that the vendor, who was also the inventor, grossly misrepresented the capacity of the loom and his own success in selling and put it in operation; and that the purchaser, being ignorant of these matters, was induced by these misrepresentations to enter into the contract.
2. *Waiver of right of rescission by laches and subsequent ratification.*—Where the contract was made on the 8th June, 1853; and the vendor's representations respecting the subject of the sale—the patent right for an improvement in looms—related to its adaptedness to be worked by hand, and to be driven by machinery in factories; and the purchaser, having discovered the falsity of the former representations, proposed a rescission in November, 1853, which the vendor declined; and the purchaser afterwards made renewed efforts to obtain a model loom, of the size and description specified in the contract, and also endeavored to sell looms in the district of country embraced in his purchase, representing that they could be successfully worked by machinery in factories; and, having failed in all his efforts, filed his bill to rescind in February, 1856,—*held*, that there was nothing in these circumstances which amounted to a waiver or forfeiture of the right of rescission, which had been duly perfected by the offer to rescind in November, 1853.
3. *Admissibility of parol evidence to vary or contradict writing.*—The rule which forbids the admission of parol evidence, to add to, vary or contradict a written instrument, does not apply where the rescission of a contract is sought in equity on the ground of fraud.
4. *Variance.*—It was objected in this case, that there was a fatal variance between the allegations and proof, because the bill alleged one entire contract, while the proof showed two distinct contracts; but the court held, that the evidence established one entire contract, as stated in the bill, although several writings were executed between the parties, which did not refer to each other.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by William F. Pierce, against John Wilson and Richard Davis, on the 22d February, 1856; and sought to obtain the rescission of a



contract, by which the complainant purchased from said Wilson the right to make, use and vend, within the State of Tennessee, "a certain improvement in looms," for which said Wilson had obtained a patent from the United States on the 29th May, 1849; and also to enjoin an action at law on the note given for a part of the purchase-money, instituted by Davis, as assignee of Wilson. The contract was made in the town of Eutaw, Alabama, on the 8th June, 1853. The terms of the contract, and the representations of Wilson which induced the complainant to enter into it, are thus stated in the bill:

"2. And your orator further sheweth, that the said Wilson, to induce your orator to purchase his said patent right for the State of Tennessee, represented to and assured him that a loom of proper size, constructed on the principle of his said patent, and after the plan of a model exhibited by him in the town of Eutaw, which seemed to perform well, weaving cloth about a quarter of a yard wide, could be operated and worked by any ordinary hand; that an ordinary negro slave could, with said loom, weave good, substantial, plain cloth, one yard wide, at the rate of three yards per hour, or thirty yards per day; that the machinery of said loom was not liable to get out of order by use, so as to need frequent repairs; that it was well adapted to be worked by hand, or to be driven by machinery in factories; and that a loom constructed on the principle of said patent, and after said model, with an additional expense of five dollars in its construction, would weave good jeans, or double cloth. And when your orator expressed his apprehension that the loom, when made of proper size to weave cloth a yard wide, might not perform well, and inquired why he had not put said loom in successful operation before that time, said Wilson assured your orator that there could be no doubt or difficulty on that subject; that his looms had been tried and proved; that he had sold and put up seven hundred looms under his said patent in the State of South Carolina, where he lived, and they were then in successful operation.

"3. And your orator further sheweth, that he verily

believes, and therefore charges, that the said representations, statements and assurances of said Wilson, in relation to his said loom, were untrue; that said Wilson knew them to be untrue when he made them, and made them for the purpose of deceiving and defrauding your orator in that behalf; that looms made upon the principle of said patent, and after the model exhibited by him in the town of Eutaw, and of a proper size, would not in fact weave good, plain cloth, one yard wide, at the rate of thirty yards per day, under the superintendence of an ordinary hand, and could not be operated by an ordinary negro slave; nor could said looms, with an additional expense of five dollars, be made to weave good jeans, or double cloth; nor were they adapted to be used as power-looms in factories; nor had he in fact put up seven hundred looms, or any other number, which were then in successful operation in South Carolina. But your orator, not being a machinist, and relying upon the said false and fraudulent representations of said Wilson, and believing them to be true, was induced to purchase, and did purchase from said Wilson, his patent right for said looms for the State of Tennessee, and took from said Wilson a transfer of his said patent for said State, and executed to said Wilson his promissory note for \$1500, and also a deed of conveyance for your orator's house and lot in Eutaw, copies of which transfer, deed and note are hereto attached, marked A, B, C, respectively, and prayed to be taken as a part of this bill.

"4. And your orator further sheweth, that as a part of the said contract between him and said Wilson for the sale of said patent right, and for the same consideration, said Wilson undertook and agreed to have constructed under his own superintendence, on the principle of the model loom exhibited by him as aforesaid, a good model loom of proper size to weave cloth one yard wide, and to deliver the same to your orator, in the city of Montgomery, on or before the 1st November, 1853, so that your orator would have a proper model, and could at once proceed to have looms built, and commence his operations and sales

in the State of Tennessee ; your orator agreeing to pay fifty dollars for the expense of constructing said loom. And your orator charges, that said Wilson, in pursuance of his said agreement, did contract for the building of a loom in Montgomery for your orator, of proper size to weave cloth one yard wide, and notified your orator that the same would be ready by the first day of August ; and your orator went there, about that time, to receive said loom, and found that it would not operate or perform so as to be of any value whatever, nor would it weave cloth as said Wilson had represented, but entirely failed to meet his representations ; and said Wilson never did, either at Montgomery or elsewhere, deliver to your orator a model loom as he had contracted to do," &c.

The bill further alleged, that the complainant, in November, 1853, through his agent, offered to rescind the contract, but said Wilson refused to do so ; that he afterwards made repeated, but unsuccessful efforts, at his own expense, to obtain a model loom ; that the invention is entirely valueless, and he has never been able to sell a single loom, nor has he realized anything from his said purchase. The prayer of the bill was for a rescission of the contract, the cancellation of the deed for the house and lot, an injunction of the action at law on the note, and general relief.

The defendants filed separate answers. Each insisted, that the contract was not correctly set forth in the bill ; and that the agreement for the delivery of the model loom was a distinct contract, founded on a new consideration, and evidenced by a writing which made no reference to the contract for the sale of the patent right. This writing, which was made an exhibit to the answer of the respondent Wilson, was in the following words :

"Mr. John Wilson has agreed to deliver me a loom, according to improved patent obtained 29th May, 1849, by the 1st day of August, if he possibly can ; and if the said loom is delivered to me, in Montgomery, by the 1st day of November next, then I promise and bind myself to pay him the sum of fifty dollars for the same ; but the



said loom is to be delivered at as early a day as he can have it made. June 8, 1853."

(Signed)

"WM. F. PIERCE."

Wilson denied all the charges of fraud and misrepresentation; alleged that his statements respecting his patent loom, which were publicly made in the town of Eutaw, were true; that the complainant was induced to make the purchase, not by any representations of said respondent, but by the fact that other persons in Eutaw, in whose judgment he reposed confidence, had bought the right to make and sell the loom in Alabama and Mississippi; and insisted that the complainant, if he had ever perfected any right of rescission, had waived that right by his subsequent conduct and declarations.

Davis stated in his answer, that he purchased the complainant's note for \$1500 from Wilson, on or about the 10th June, 1853; that he afterwards informed the complainant that he was the holder of the note, and inquired whether he would pay it at maturity; that the complainant returned an evasive answer, and said that he could not then tell whether he would pay the note or not; and that he afterwards agreed to, and did accept service of the writ in the action instituted on the note. He also demurred to the bill, for multifariousness, and because the complainant had a complete remedy at law.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, on the ground that the complainant, if he ever had any right of rescission, had forfeited that right by his repeated efforts to sell the loom in Tennessee after his offer to rescind the contract; and his decree is now assigned as error.

S. F. HALE, and JNO. G. PIERCE, for appellant:

1. Fraud constitutes one of the original grounds for the interposition of a court of chancery, whether it consists in the suggestion of falsehood, the suppression of truth, or false statements recklessly made. In this case, the bill makes out a clear case for the rescission of the contract on the ground of fraud, and the proof fully sustains the bill. The utmost good faith was required on

the part of the vendor, because, being himself the inventor, he had special knowledge of the subject-matter of the contract, while the purchaser was entirely ignorant on the subject, and, therefore, bound to rely on the statements of his vendor. The defendant's representations as to the capacities of his improved loom, and his success in putting it into operation in South Carolina, constituted a material inducement to the purchase; and the falsity of these representations, which is clearly established by the evidence, entitles him to a rescission.—Adams on Equity, 421; Foster v. Gressett's Heirs, 29 Ala. 393; Munroe v. Pritchett, 16 Ala. 789; Read v. Walker, 18 Ala. 324; 2 Ala. 603; Smith v. Richards, 13 Peters, 26; 15 Ill. 148; 2 Story's Equity, §§ 694-5; 1 Dana, 30; 3 Ala. 237.

2. The general rule is, that a party who seeks the rescission of a contract, on the ground of fraud, must offer to rescind, and tender back the property, within a reasonable time; but what is a reasonable time, depends on the circumstances of each case.—Kern v. Burnham, 28 Ala. 428; Foster v. Gressett's Heirs, 29 Ala. 393. In this case, the complainant brought himself within the strict letter of the rule, by his immediate and repeated offers to rescind; and there is nothing in his subsequent conduct which amounts to a waiver or abandonment of the right of rescission thereby perfected. His subsequent endeavors to sell, and to get the loom tested in Tennessee, were made in good faith, before he had ascertained the entire falsity of all the defendant's representations, and when he had the right thus to test their truth; and the defendant was in no wise injured by them. Before a defrauded party will be held to have waived his right of rescission, duly perfected by a timely offer to rescind, his subsequent conduct must be shown to have been with a full knowledge of all the facts, and with the intent to confirm the invalid contract.—Johnston v. Johnston, 5 Ala. 96; Calloway v. McElroy, 3 Ala. 408.

3. But, even if the first offer to rescind was waived and abandoned, that does not affect the complainant's right to rescind on his subsequent discovery of the fraud in the second class of representations, to-wit, those which related

to the capacity of the loom to be operated by machinery in factories; nor was it necessary, on the discovery of that fraud, to make another offer to rescind, as the chancellor thought was necessary. The discovery of the second fraud remitted the complainant to his right of rescission already perfected. Moreover, the respondent's conduct showed that he would again refuse an offer to rescind; and the law does not require a party to do a useless thing. The proof shows, too, that the invention which was the subject of the sale is perfectly valueless; and in such case an offer to rescind is unnecessary. If any offer was necessary, the tender in the bill is sufficient. On these points see the following authorities: Griggs v. Woodruff, 14 Ala. 19; Elliott v. Boaz, 9 Ala. 779; Barnett v. Stanton, 2 Ala. 181.

4. The proof sustains all the allegations of the bill as to the material stipulations of the contract. If there is any variance, it is as to mere collateral and immaterial matters.—26 Ala. 312; 25 Ala. 554.

J. D. WEBB, and R. F. INGE, *contra*.—1. A misrepresentation, to constitute a fraud, must relate to a material fact, going to the essence or subject-matter of the contract, must actually mislead and injure the purchaser, and the contract must be based upon such misrepresentation.—Story's Equity, 204, 208, 211; 29 Ala. 393; Story on Contracts, § 507; Parsons on Contracts, 266-7; Chitty on Contracts, 689; Atwood v. Small, 6 Cl. & F. 232; 12 East, 437-8; Buls. 95; Foster v. Charles, 6 Bing. 396. Under these authorities, the defendant's representations respecting the number of looms which he had put in successful operation in South Carolina, if untrue, do not authorize a rescission of the contract on the ground of fraud. That was a matter outside of the contract—it did not affect the value of the loom, nor did it in any wise injure the purchaser; and the proof shows that, instead of these representations constituting an inducement to the purchase, the complainant was led to make the purchase by the fact that other men, well known to him, and in whose judgment he had confidence, had made sim-



ilar contracts for other States. The defendant's other representations, respecting the capacity of the loom, are proved to have been correct by the testimony of several witnesses, and by the complainant's own declarations.

2. If any right of rescission ever existed, it has been lost and forfeited. To authorize a rescission on the ground of fraud, the party must act promptly on the discovery of the fraud; must make an offer to return the property, and must not exercise any subsequent acts of ownership over it.—*Barnett v. Stanton & Pollard*, 2 Ala. 189; *Dill v. Camp*, 22 Ala. 259; *Sto. on Con.* § 168. The proof shows that, in March, 1854, long after the discovery of the alleged fraud, the complainant purchased a model loom, constructed on the principle of Wilson's patent, carried it to Tennessee, and there offered to sell it; and declared, on his return, that its performance in factories even exceeded Wilson's representations.

3. There is a fatal variance between the allegations and proof. The bill alleges one entire contract, founded on one and the same consideration, for the purchase of the patent right and the furnishing of a model loom by a specified day; while the proof shows two distinct contracts, founded on separate and distinct considerations, and evidenced by different writings, which do not even refer to each other.—*Evans v. Battle*, 19 Ala. 398; *Crothers v. Lee*, 29 Ala. 237; *Crabb's Adm'r v. Thomas*, 25 Ala. 212; 28 Ala. 613.

RICE, C. J.—In 1849, the respondent, Wilson, obtained letters patent of the United States, for certain improvements in looms. On or about the 8th day of June, 1853, in this State, he sold and assigned to complainant all the right, title and interest which he had in said invention so secured to him by the letters patent, "for, to, and in the State of Tennessee, within its entire limits, and in no other place," to be held and enjoyed by complainant as fully and entirely as the same could have been held and enjoyed by the said Wilson, had the said sale and assignment not been made.

The complainant seeks a rescission of that sale; and

from the allegations of his bill, and the proofs in the cause, it appears that he, being ignorant of the qualities of the subject of the sale, was induced to make the purchase by the fraudulent misrepresentations of the said Wilson, in regard to material facts and matters, such, for instance, as the qualities of the subject of the sale; that the complainant had the right to rely upon these misrepresentations as truthful representations, and did rely upon them as true, and was thereby deceived and injured. The complainant is, therefore, entitled to a rescission of the sale, unless he has lost his right to a rescission by an affirmance of the contract after the discovery of the fraud, or by a failure to manifest the election to disaffirm it within a reasonable time after such discovery.—*Foster v. Gressett*, 29 Ala. 393, and cases there cited; *Kern v. Burnham*, 28 *ib.* 428; *Couse v. Boyles*, 3 Green's Ch. R. 212.

It is too clear for argument, that nothing said or done by him since the full discovery of the fraud amounts to an affirmance of the contract; and that upon the facts as presented by the record, and under the settled law of this State, there has not been any affirmance or confirmation of the contract by any act of the complainant since he acquired knowledge of the fraud.—*Thompson v. Lee*, 31 Ala. 292; *Huckabee v. Albritton*, 10 Ala. 657; *Boyce v. Grundy*, 3 Peters, 210.

We come, then, to the question, whether the complainant's right of rescission has been lost by a failure to manifest the election to disaffirm the contract within a reasonable time. It is settled by the cases first above cited, that what is a reasonable time must be determined from the circumstances of the particular case. Now, in this case, the following circumstances seem to us to be of controlling importance: The vendor was the inventor of the improvement in the machine, (the loom.) He had thoroughly tested its qualities, and was perfectly acquainted with them. He had procured letters patent for his invention and improvement. He was a citizen of South Carolina. He came to Alabama, and here made his offer to sell to the complainant, a citizen of this State, who was wholly ignorant of the falsity of the representations

of the vendor. His representations were of, at least, *two classes*, to-wit, those which related to the capability of the machine for being profitably worked by any ordinary hand or negro slave, and those which related to its capability and adaption, by a slight additional expense in its construction, for being profitably used and driven by machinery in factories. His representations were of the most positive character, and as well framed, in the various turns of the negotiation for the sale, for quieting the apprehensions and commanding the reliance and faith of the complainant, as they well could have been. The discovery of the falsity of *one class* of his representations would not necessarily imply a discovery of the falsity of *the other* class. The nature of the machine, and of the representations, was such that one or two experiments, to ascertain the qualities and capabilities of the machine, might reasonably be regarded as not furnishing a decisive test of its qualities and capabilities, or satisfactory proof of the falsity of each class of the positive representations of the vendor. The vendee was, to some extent, delayed in making such experiments by the artifices of the vendor. Not long after the sale, the vendor had returned to his residence in South Carolina. In September, 1853, (about three months after the sale,) the complainant, by his agent, having discovered in South Carolina the falsity of *one class* of the vendor's representations, proposed to the vendor to rescind the contract; and thereupon Wilson agreed, that if he did not furnish a certain model loom by the 1st of November, 1853, the contract should be rescinded. On said 1st of November, 1853, the vendor having failed to furnish the model loom, the complainant, by his agent, offered to the vendor to rescind said contract, and to surrender up his aforesaid transfer of the patent right; but the vendor refused to rescind. At that time, the complainant had not by any experiment discovered the falsity of *one class* of the vendor's representations, to-wit, those relating to the capabilities of the machine for being well worked and driven by machinery in factories. The vendor having refused to rescind, the vendee proceeded at his own expense, without unreasonable delay, to have



the capabilities of the machine for being worked and driven by machinery tested by actual experiments; and after ascertaining by these experiments the falsity of the vendor's representations in that respect, and being sued by the transferee of the vendor upon a note given for part of the purchase-money, but never having been put out of possession of the house and lot, which was to go to the vendor, Wilson, as part of the price for the patent right, the vendee filed his bill for relief.

But it is said, that Pierce *offered* to sell in Tennessee, and that he made declarations to the effect that the patent right and machine were of great value. Admit all that; still, he had a clear right to test, not merely once, but fully, the value of the patent right and of the machine, and the truth or falsity of *each class* of the representations of Wilson. A mere *offer* by Pierce to sell, without effecting any sale, and declarations by him as to the value of the machine, made after he had learned and believed the falsity of every class, save one, of Wilson's representations, but before he had, by experiments and tests, ascertained the falsity of that single class, cannot constitute an answer, in a court of equity, to Pierce's claim to rescission—a claim supported by the previous timely offer of rescission and actual tender back of the transfer of the patent right, made by Pierce and refused by Wilson, and by the well known determination of Wilson not to rescind or receive back the transfer of the patent right. A defrauded vendee, who has rendered perfect his right to *claim a rescission in a court of equity*, by a timely offer of rescission and tender back of the thing received by him under his purchase, cannot lose *that right* by mere declarations as to the value of the thing he had bought, nor by unavailing efforts to dispose of it, when it is clear that such declarations and such efforts could not, and did not in any way mislead or injure the vendor, or any one claiming through him under the fraudulent contract; and that the determination of the vendor not to rescind or receive back the thing sold was well known at and before such declarations and efforts were made, and was in no way

changed or affected by them.—See *Dill v. Camp*, 22 Ala. 249, and cases therein cited; also, the cases cited *supra*.

The complainant is here proceeding, *not upon a contract*, but for a *fraud* practiced upon him in a contract made between him and Wilson. He claims a rescission on account of that fraud. By the very nature of his case, he is authorized to show that the contract really made was different from that shown by the writings executed by the parties. The rule, that parol evidence cannot be resorted to, to vary, contradict, or explain written instruments, does not apply to the case. The very fact, that there is a material difference between the contract really made by the parties and the contract which might be inferred from the written instruments, is a circumstance which, with others, may be urged, in a case like this, to prove the fraud complained of.—*Dixon v. Barclay*, 22 Ala. 370; *Cowles v. Townsend & Milliken*, 31 Ala. 133, and cases therein cited.

In suits for specific performance, the rule which exacts a correspondence between the allegations and proof of the terms of the contract, is adhered to with great strictness. *Williams v. Barnes*, 28 Ala. 613. In suits for the rescission of contracts on account of fraud, that rule is not applied with the same strictness.—*Lanier v. Hill*, 25 Ala. 554. We do not think there is any fatal variance here between the allegations and proof.

We are satisfied that the complainant is entitled to a decree rescinding the sale. If Wilson had never transferred the note given to him by Pierce for a part of the purchase-money, it is clear that Wilson could not be permitted, by a court of equity, to enforce that note against Pierce; and there is nothing shown in the answer of the transferee, Davis, which gives him any better right to enforce the note than his transferror would have if he had never transferred it. Pierce did not induce Davis to buy the note, and has not done anything that precludes him from urging against Davis the same objections to the enforcement of the note, that might be urged against Wilson, if Wilson had never parted with it.—See *Lanier*

v. Hill, 25 Ala. 554; Clements v. Loggins, 2 Ala. 514; Huckabee v. Albritton, 10 Ala. 657.

The decree of the chancellor is erroneous. It is reversed; and the cause is remanded, with directions to the court below to proceed to carry out the views and principles declared in this opinion.

The appellees must pay the costs of the appeal.

NOTE BY REPORTER.—The foregoing opinion was delivered at the January term, 1859. On application for a rehearing, by the appellees' counsel, the following opinion was pronounced at the ensuing June term :

STONE, J.—When we, at the last term, set aside the judgment we had announced, and held this case under further advisement, we had been led to doubt on two of the points which were pressed in argument—namely, the question of variance between the allegations and the proof, and the question of ratification by Mr. Pierce of the contract, after he had been informed of the fraud practiced upon him in the sale by Mr. Wilson. We entertained no doubt, that Mr. Wilson had most grossly misrepresented the capabilities of his invention, and that, relying on those representations as true, Mr. Pierce had been induced to make the purchase.

It will be readily perceived, that the chief purpose of Mr. Pierce, in becoming the proprietor of the patent for the State of Tennessee, was that he might vend to others individual and local rights to make and use Wilson's patent loom. Hence, saleableness of the invention would be with him an inducement to purchase, little, if any, less controlling than adaptedness to use by hand power or machinery. The representations of Mr. Wilson, which are fully proved, that he had sold and put into successful and satisfactory operation in the State of South Carolina a large number of looms, constructed on the principles of his patent, rightfully would, and no doubt did, determine Mr. Pierce in making the purchase. The evidence forces upon us the conclusion, not that Mr. Wilson, in the enthusiasm of an inventor, innocently over-rated the



capacities and value of his discovery, but that he knowingly and recklessly misstated the facts in every important particular. The statement by him, that several hundred looms had been tried, and had given satisfaction, was the assertion, *as matter of fact*, that the invention would subserve the purposes for which he commended it, and not the mere expression of an opinion favorable to its utility.

It being shown that Mr. Pierce was drawn into the contract with Mr. Wilson by the fraud of the latter, the law arms him with the right to rescind, unless he has, by his after conduct, forfeited that right. It is contended for appellee, that Mr. Pierce, after he was informed of the fraud, has ratified the contract, and thus made it valid, by entering into new stipulations, and dealing with the property as his own.

In *Thompson v. Lee*, 31 Ala. 292, 303, we thus stated the rule: "If one who has been defrauded, and has become fully apprised of the fraud, afterwards ratifies such voidable contract, or enters into new stipulations in regard to the subject-matter of the contract, inconsistent with his right to insist on a rescission, and there be nothing more in the transaction, he cannot be heard to complain of such fraud." It will be observed, that the rule requires that he shall be *fully* apprised of the fraud.

In the present case, we cannot say that Mr. Pierce was *fully* apprised of the fraud. True, he had discovered some of the representations of Mr. Wilson to be false. He knew the loom had not been tested and approved in South Carolina. He also knew, or was informed, that Mr. Wilson had not met with the success in making sales in South Carolina which he had represented. Still, we are not informed by the evidence that he was *fully apprised* until after his faithful trial to sell the loom, and to have it introduced in the State of Tennessee, demonstrated that it was nearly or quite valueless. He did not ratify the contract, after being *fully apprised* of the fraud.

Nor did he enter into new stipulations, *inconsistent* with his right to rescind. The only *new stipulations* imputed to him, were renewed exertions to obtain a model loom,

and continued, though unsuccessful efforts to test the loom, and introduce it into use. These but show the fidelity with which he labored to carry out his contract in good faith. They did not, and could not, injure Mr. Wilson; and do not estop the complainant from seeking a rescission.

Mr. Pierce was drawn into this contract by a misplaced confidence in the representations of Mr. Wilson. The fact that he did not, on the discovery of one falsehood, distrust everything which Mr. Wilson had represented, may tend to prove him unduly credulous. Credulity is not criminal. On the contrary, it denotes a generous and ingenuous nature. We are loth to declare a rule which converts the best principles of humanity into legal disabilities.

Nor do we find anything in the record to justify us in denying relief to the complainant, because of any supposed variance between the allegations and proof. The contract was one and entire—each stipulation forming an ingredient of one collective whole, although all the parts were not evidenced by one and the same paper-writing. This is fully proved by the witness Pierce, and is strongly confirmed by the testimony of the witnesses Constantine and Hall. Mr. Webb does not prove the making of the contract, but only the execution of the written evidence of it. His testimony is not inconsistent with theirs.

. Suppose a sale should be made, by one and the same contract, of a plantation and stock. The sale of the land would be evidenced by writing, because the law requires it to be so. The stock would probably not be mentioned in the writings, because the title to personal property passes by mere sale and delivery, without writing. Yet, we apprehend that no one would contend that the parties had made two contracts.

Nor is there anything in the fact, that two notes or obligations were given by Mr. Pierce. Purchase-money is frequently secured by more notes than one, and yet no one supposes that this destroys the unity of the contract.

The evidences in favor of the proposition that this was one contract, are as strong as in the case above supposed.

In truth, we think the contract charged is precisely and fully proved.

We re-assert and re-adopt the opinion pronounced at the last term by RICE, C. J.

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## DENNIS vs. COKER'S ADM'R.

[CONTEST AMONG CREDITORS OF INSOLVENT ESTATE.]

1. *Sufficiency of affidavit verifying claim.*—An affidavit of the creditor himself, or of a third person, to the effect “that the annexed account is just and correct, to the best of his knowledge and belief,” without more, is not a sufficient verification of a claim against an insolvent estate.
2. *Amendment of insufficient verification.*—The act of 1858, (Session Acts 1857-8, p. 37,) authorizing the amendment of insufficient affidavits, does not apply to a case in which nine months after the declaration of insolvency had expired before the passage of the act.

### APPEAL from the Probate Court of Monroe.

IN the matter of the estate of George W. Coker, deceased, which was regularly declared insolvent on the 22d October, 1855, and against which the appellant, as the surviving partner of the firm of J. B. & P. M. Dennis, had filed as a claim an account for \$189 92. The affidavits annexed to this claim, on which its allowance was asked, were the following: 1st, the affidavit of J. B. Dennis, deceased, made before a justice of the peace on the 18th September, 1854, stating “that the annexed account is just and correct, to the best of his knowledge and belief;” 2d, the affidavit of G. M. Longmire, made before a justice of the peace on the 8th March, 1855, stating “that the annexed account is just and correct, to the best of his knowledge and belief;” 3d, an additional affidavit by said Longmire, made before the probate judge on the 5th April, 1858, in which he stated, “by way of amendment to his above affidavit heretofore made, that he was



the clerk in the store of said J. B. & P. M. Dennis when the annexed account of Geo. W. Coker was made, and believes said account to be correct and true, and also that said account is due and unpaid, for the following reasons: that he never knew of any payment being made on said account, (except \$30, for which there is a credit,) although he was in said store until about the 10th January, 1853; that he assisted in posting up and drawing off said account in the summer or fall of 1853; and that he heard J. B. Dennis, now deceased, both before and after the death of said Coker, frequently say that said account was unpaid;" and, 4th, the affidavit of the claimant himself, P. M. Dennis, made before the probate judge on the 28th May, 1858, stating, "as an amendment to the above affidavits, that the annexed account is true and now due." On this proof, the probate court rejected the claim; to which ruling the claimant excepted, and which he now assigns as error.

J. W. POSEY, for appellant.

S. J. CUMMING, *contra*.

R. W. WALKER, J.—Under the rule adopted in Pickell v. Ezell, 27 Ala. 623, we must hold, that the affidavit of J. B. Dennis, and the original affidavit of Longmire, do not properly verify the claim of the appellants.—See, also, Lay v. Clark, 31 Ala. 409.

[1.] The subsequent affidavits, made in April, 1858, can have no influence on the case. The act of February 6th, 1858, (Acts '57-8, p. 37,) does not apply, where the nine months after the estate was declared insolvent had expired before the statute was enacted.

The decree of the probate court is affirmed.

SALTMARSH *vs.* BOWER & CO.

## [ASSUMPSIT ON COMMON MONEY COUNTS.]

1. *Re-examination of party as witness.*—When the deposition of the nominal plaintiff has been taken, at the instance of the defendant, on interrogatories and cross-interrogatories, it may be re-taken by the beneficial plaintiff under the act of 1856, (Session Acts 1855-6, p. 28,) on making the prescribed affidavit; and it is no objection to the second deposition, that the commission does not state that it is to operate by way of re-examination or cross-examination.
2. *Specific objection to deposition.*—A motion to suppress a deposition, on a specified ground, is an implied waiver of all other grounds of objection; and the party will be confined in the appellate court to the specified objection.
3. *General objection to deposition.*—A general objection to a deposition as evidence, not assigning any particular reason, nor specifying any particular point, may be overruled entirely, if any part of the deposition is legal evidence.
4. *When objection to deposition must be made.*—An objection to a portion of a deposition, on the ground that it is not responsive to the interrogatory, cannot be made for the first time on the trial, unless accompanied by proof that it could not have been made at an earlier opportunity.
5. *When witness may testify to opinion or conclusion.*—A witness cannot be allowed to state, in reference to an advance of money, that he “did not consider that this was a loan.”
6. *Same.*—Where a witness used this language, “It was understood between B. and myself, and was agreed on before the failure of B. & Co., to dispose of the claim in this way, and, as we thought, to the satisfaction of all parties concerned,”—held, that the word *understood*, being evidently used as the synonym of *agreed*, was not objectionable as the expression of an opinion by the witness; and consequently, that an objection to the entire answer might be overruled, although the latter portion of it was not admissible evidence.
7. *Relevancy of evidence affecting question whether contract of partner is binding on partnership.*—It being a material question, whether certain acceptances in the name of a firm were binding on the partnership, or were the act of one partner individually, without the knowledge or consent of his co-partner, and for a consideration outside the scope of the partnership business, evidence showing the nature and character of the general business in which the partnership was engaged is relevant and admissible.
8. *Attorney's authority to make admissions.*—Held, on the authority of *Rosenbaum's case*, 33 Ala. 354, that there was no error in the refusal of the primary court to suppress an admission of record made by the defendant's former attorney, on the affidavit of the defendant himself that he “supposed said admission was inadvertently made.”

9. *Waiver of right of set-off by contract and breach thereof.*—Defendant having a judgment against plaintiff and another, (the latter as surety of plaintiff.) and plaintiff having at the same time an unsatisfied account against defendant; an agreement between them that the account should be credited on the judgment, coupled with the transfer of the account by plaintiff to his surety, in order that it might be so credited for his protection, and the subsequent breach of the agreement by defendant, in coercing satisfaction of the entire judgment out of the surety,—do not prevent defendant, when sued on the account by plaintiff, for the use of his surety, from pleading as a set-off any other demand due to him by plaintiff.
10. *Conclusiveness of judgment.*—Where a petition for the *supersedeas* of an execution is filed by one of the defendants in the judgment, who was the surety of his co-defendant, setting up a contract between his co-defendant and the plaintiff, to the effect that an account held by the former on the latter, equal to the amount due on the judgment, should be credited on the judgment,—the judgment of the court, dismissing the *supersedeas*, is conclusive on the petitioner, in a subsequent action on the account, as to the making of the alleged contract, but is not *prima facie* conclusive against the correctness of the account.
11. *Effect of recitals of record as evidence.*—When a transcript, showing the proceedings had on a petition for the *supersedeas* of an execution, is offered in evidence in a subsequent suit, the petition for the *supersedeas*, though admissible in evidence as a part of the record, is not competent evidence of the facts stated in it.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by William Bower & Co., late partners, for the use of John N. Smith, against Alanson Saltmarsh, and was commenced on the 7th, October, 1847. The cause of action was the sum of \$2,318 23, alleged to be due on an account stated, for goods, wares and merchandise sold and delivered, for money had and received, and money paid, laid out and expended, as stated in the common money counts. The pleas were, *non assumpsit*, set-off, and payment; and the cause was tried on issue joined on all these pleas. The case was before this court at its January term, 1853, and may be found reported in 22d Ala. 221.

The firm of William Bower & Co. was composed of William Bower and George Haig, to both of whom interrogatories were propounded by the defendant, and cross interrogatories on the part of the beneficial plaintiff, in March, 1849. In October, 1856, the deposition of said



Bower was re-taken by the plaintiff, and was read in evidence on the trial, against the defendant's objections. The several objections which were made to this deposition, and to distinct portions thereof, and also to different portions of the deposition of said Haig, will be readily understood from the opinion of the court.

The material facts of the case, which give rise to the legal questions involved in the charge of the court to the jury, are briefly these: On the 22d October, 1845, Saltmarsh recovered a judgment against William Bower and John N. Smith, (the latter as surety of said Bower,) for over \$6,000, in the circuit court of Lowndes county. At that time Saltmarsh was indebted to said William Bower & Co., who were his commission-merchants in Mobile, for a balance due on account, for advances made, amounting to \$2,318 23; and it seems to have been agreed between him and Bower that this account should be credited on said judgment. The account was afterwards transferred by Bower & Co. to Smith, for his partial protection against the judgment, or in order that he might have it credited on the judgment; and Smith paid on the judgment the balance due, as he claimed. Bower & Co. having become insolvent, and Saltmarsh being bound as their surety on other liabilities, which he afterwards had to pay, he had an execution issued on his judgment against Bower and Smith, and sought to make the balance of his debt out of the latter. Smith then filed his petition for a *supersedeas* of the execution, setting up the agreement above mentioned, relative to the credit of the account on the judgment, and insisting that the balance due on the judgment, after deducting the account, was fully paid. On the final hearing of the *supersedeas* case, "the matters of fact and of law being submitted to the decision of the court without a jury," the court excluded all the evidence offered on both sides, and dismissed the *supersedeas*, at the costs of the petitioner; and Smith was afterwards compelled to pay the balance due on the judgment. This action on the account being brought before the final disposition of the *supersedeas* case, the defendant endeavored to establish as a set-off the debts which he

had been compelled to pay for Bower & Co. after their insolvency; while the plaintiff relied on the agreement and facts above stated, as precluding that defense.

The plaintiff offered in evidence, during the trial, the record of the *supersedeas* case, and the court admitted it against the defendant's objections. The plaintiff also offered in evidence a written admission, signed by the defendant's former counsel in this case, in the following words: "It is admitted in this case, that Col. Geo. W. Gayle will testify that, some time in March, 1851, John N. Smith, as the surety of Wm. Bower & Co., paid the amount of a judgment rendered in the circuit court of Lowndes county, in favor of defendant, against said Smith, in which the execution was superseded by said Smith; the amount paid by said Smith amounting to \$3,000, or more." "The defendant moved the court to suppress said admission, as inadvertently made, and offered his own affidavit, sworn to and subscribed, in open court, on the 4th November, 1857," in which he stated, "that he never knew of said admission until this morning; that he supposed said admission was inadvertently made; and that said debt was the debt of William Bower alone, and of his sureties thereto, and was not a debt of Wm. Bower & Co." "The plaintiffs resisted the motion to suppress, and showed, by their attorney, that the said admission had been on file for some time; but the defendant's counsel stated, that they had never seen it until it was offered. On this proof, the court overruled the motion to suppress the admission; and the defendant excepted."

"The court charged the jury, among other things, that if the judgment in Lowndes county was obtained on an indebtedness for which Smith was only surety, and Bower was principal; and if the account sued on was transferred by said Bower to Smith, in consideration of his liability under such judgment, and with the view of having it credited on said judgment; and if such transfer was made pursuant to an understanding or agreement between plaintiff and defendant, that said account, to the extent of it, should be a payment of, or allowed as a credit on the judgment,—then, if it was not allowed as a credit on

the judgment, and Smith was compelled to pay, and did pay the judgment, the defendant would not be entitled to set off against it any demand in his favor against William Bower & Co."

The court also charged the jury, at the request of the plaintiff, as follows: "That if they believed from the evidence that it was agreed between the plaintiff, defendant and Smith, that the account sued on was to be applied in payment of the judgment in Lowndes county against Smith, and that said account was transferred to Smith in pursuance of this agreement, then the defendant would not be entitled to any set-off." To this charge the defendant excepted.

"The jury having returned into court for further instructions, and asked the court whether they could look to the statements of Smith contained in his petition for a *supersedeas*, as set forth in the transcript from Lowndes circuit court, the court thereupon stated to them, 'that the whole transcript was in evidence before them, and they could look to each part of it as evidence of what it purported to be.' The defendant excepted to this charge, and requested the court to instruct the jury, 'that the matters contained in said petition could not be looked to as evidence in this cause;' which charge the court refused to give, and the defendant excepted."

"The defendant further asked the court to instruct the jury, 'that they might look to the judgment of said circuit court of Lowndes county upon said petition, and if the same was against said petition, it was a judicial determination of the matters and things therein stated and contained, and that the same were not true;' which charge the court refused to give, and the defendant excepted."

The rulings of the court on the evidence, the charges given to the jury, and the refusal of the several charges asked, to which exceptions were reserved, are now assigned as error.

BROOKS & VARY, for appellant.

I. W. GARROTT, *contra*.



A. J. WALKER, C. J.—The motion to suppress the cross-examination or re-examination of the nominal plaintiff, Bower, was predicated upon the two specified grounds, that there was no law authorizing it, and that this was not a case in which it could be allowed. The act of Feb. 8th, 1856, allows a re-examination, “either with or without interrogatories, by a party who had made a previous cross-examination that was imperfect or insufficient, but not made so by his willful neglect.” The prescribed prerequisite of such re-examination is, that the party, his agent, or attorney, shall make a satisfactory showing, upon oath, in writing, filed in open court, or with the clerk or register in vacation, of sufficient excuse for not having perfected the cross-examination before, and that a further cross-examination is necessary to secure justice upon the trial of the cause. The act further directs, that the deposition shall, in all respects, operate as a cross-examination.—Pamphlet Acts of '55, '56, p. 28.

A reference to this statute obviously demonstrates the unsoundness of the first objection, if the re-examination was taken under the statute above named. The witness was the nominal plaintiff, but the defendant made him his witness by taking his deposition; and the beneficial plaintiff cross-examined imperfectly, from causes of which a satisfactory explanation was made by affidavits filed in pursuance to the statute. When the defendant thus examined the witness by taking his deposition, and the plaintiff had cross-examined, the defendant stood in reference to the deposition, as if the witness had been disinterested, and unconnected with the record, (*Stewart v. Hood*, 10 Ala. 600; *Lyde v. Taylor*, 17 Ala. 270;) and the right to re-examine under the statute was the same as it would have been in the case of any other witness.

It is true that the commission does not state, in terms, that the re-examination was to operate or be by way of cross-examination. But this omission could not prejudice the defendant; because, under our decisions, a party cross-examining is not confined to the subject-matter of the direct questions, but may examine generally as to all relevant matters.

The deposition was taken in pursuance to the statute, and conforms to its requisitions in every substantial particular; and the objection, that there was no law authorizing the re-examination, cannot be sustained.

[2.] No reason to support the second ground of objection occurs to us, and we can perceive no error in overruling it. The appellant is confined to the objection made in the court below, and we therefore pass by, without remark, several other objections taken in argument before this court.—*King v. Pope*, 28 Ala. 601; *Agee v. Williams*, 30 Ala. 636.

[3.] After the motion to suppress the re-examination was overruled, the defendant objected, in general terms, to its introduction in evidence. A general objection, without defining any particular point, or assigning any reason, should always be overruled, if any part of the evidence is legal. It would be a most absurd practice, to permit a party to throw upon the court the burden of scrutinizing the entire proceedings, from the making of the affidavit to the return of the deposition into court, in quest of a fatal objection; while the party stood by, forbearing to direct the attention of the court to any points of objection.—*Wallis v. Rhea & Ross*, 20 Ala. 453.

[4.] The witness Bower was asked by the second interrogatory, whether he was not forced by threats to make the transfer to the beneficial plaintiff of the account in controversy, and whether he did not make it unwillingly and in consequence of such threats. To these questions the witness responded in the negative, and then proceeded to state the reason which induced him to make the transfer, and the facts upon which the reason was predicated. The latter part of the testimony was objected to, upon these three grounds: that it was not responsive to the interrogatory; that it was irrelevant to the issue; and that it was illegal. The first objection came too late, having been made for the first time on the trial.—*McCreary v. Turk*, 29 Ala. 244; *Nelson v. Iverson*, 24 Ala. 9. Certainly, that portion of the evidence objected to, which stated that the account sued upon was chiefly for advances made to the defendant, was both legal and rele-

vant; and the court was justified in overruling the objection of illegality and irrelevancy to the entire evidence, although every other part of it may have been inadmissible.

[5.] We can conceive of no principle upon which the admissibility of the words, "I did not *consider* that this was a loan to Wm. Bower & Co.," can be vindicated. They are not susceptible of a construction which would make them expressive of anything else than the opinion, which the witness, at the time of the transaction, entertained of its legal effect.—Thomas v. DeGraffenreid, 27 Ala. 651; Ward v. Reynolds, 32 Ala. 384. The court erred in overruling the objection to this evidence. So, also, we think the court erred in refusing to exclude the last clause of Bower's answer to the 7th interrogatory, which clause begins with the words, "I did not *consider*," &c. The two last named portions of evidence, which the defendant moved to exclude, are not so blended with the other parts as to make them incapable of separation; and if they were, we would be reluctant to consent to the argument, that the admissibility of illegal evidence was secured by its intimate connection with that which was legal.

There was also error in the refusal to exclude the words, "believing it due to said Smith under all the circumstances," found in the answer of Haig to the first interrogatory. His belief or opinion, as to what was due to Smith, was not admissible evidence.

[6.] The part of the answer of George Haig to the first cross-interrogatory, to which the defendant objected, was as follows: "It was understood between Bower and myself, and was agreed on before the failure of W. Bower & Co., to dispose of the claim in this way, and, as we thought, to the satisfaction of all parties concerned." So much of this testimony as shows the understanding and agreement between the witness and Bower was pertinent to the questions, whether the transfer to Smith was voluntarily executed, and had the voluntary assent of the two partners. The word "understood" was manifestly used as the synonym of *agreed*, or *contracted*.—Griffin v. Isbell,



17 Ala. 184. A part of the evidence being legal, there was no error in overruling the objection, notwithstanding the part which stated what was "thought" was not admissible evidence.

[7.] The evidence as to the scope and character of the business of commission-merchants and cotton-factors was admissible. It seems to have been a question in the case, whether certain acceptances, in the name of Bower & Co., the nominal plaintiffs, were inadmissible as a set-off, upon the ground that they were made by one partner, without the knowledge or consent of the other, for a consideration outside the scope of the partnership business. To this question, the evidence as to the nature and character of the business in which the partners were engaged, was pertinent.

The certificate of the clerk to the exemplification of the record, in the case of Saltmarsh v. Bower & Smith, shows that the *supersedeas* bond was omitted from the transcript. It is, however, unnecessary for us to inquire whether either of the objections to the introduction of the transcript ought to have been sustained, as the defect can be remedied.

[8.] Upon the principle settled in *Rosenbaum v. The State*, 33 Ala. 354, we decide, that there was no error in the refusal to permit a withdrawal, upon the trial, of a written admission previously made by the counsel.

[9.] The charge given by the court, without request, was to the following effect: If Saltmarsh had a judgment against Bower, and against Smith as his surety, and Bower & Co. had an account upon Saltmarsh, which, it was agreed between Bower & Co. and Saltmarsh, should be credited upon the judgment; and Bower & Co., in consideration of Smith's liability as Bower's surety upon the judgment, transferred the account to Smith, that he might have it credited upon the judgment, according to the agreement of Saltmarsh with Bower & Co.; and if the account was not credited upon the judgment, and Smith was compelled to pay off the judgment,—then Saltmarsh has no right to set off his debt upon Bower & Co. against the account, when sued upon in the name of Bower & Co.,

for the use of Smith. The fundamental proposition of this charge is, that Saltmarsh was deprived of the right of pleading a set-off against the account, because he agreed that it should be credited upon his judgment, and violated that agreement by not allowing it as a credit, and by coercing payment of the entire judgment out of Smith. The correctness of this proposition can be tested by the two inquiries—whether an agreement, that an account of a judgment debtor upon the judgment creditor should be credited upon the judgment, takes away the judgment creditor's right of pleading a set-off when sued upon by the judgment debtor; and whether a violation of the agreement by the judgment creditor, and a coercion of the payment of the entire judgment, can have that effect.

Certainly, one owing an account may, by a valid contract, deprive himself of the right to interpose a set-off as a defense to a suit upon such account.—*Davis v. Carlisle*, 6 Ala. 707. But a contract that an account may be credited upon a judgment is not identical with a contract to forbear to claim a set-off against it. The two contracts are altogether distinct, in their terms, in the rights which they give, and in the obligations which they impose. One might well be willing to contract that an account on him should be credited upon his judgment, and yet be very unwilling to abandon the right of set-off against the account. A consent, therefore, to a contract to allow an account as a credit upon a judgment, is not a consent to waive the right of set-off against the account. The plaintiffs in this case cannot claim for their cause of action an exemption from liability to set-off, upon the ground of a contract of the defendant, whereby he has waived his right to that defense.

Does the fact, that the defendant has violated his agreement to allow a credit upon his judgment for the amount of his account, deprive him, when sued upon it, of the right of set-off? Upon the refusal of the judgment creditor to allow a credit upon the judgment, according to his contract, the defendants had a plain and adequate remedy, by a motion to the court which rendered the

judgment, for an entry of satisfaction, *pro tanto*, upon the judgment; and, if necessary, they might have protected themselves, *pro tanto*, by a *supersedeas* of the execution.—Bower v. Saltmarsh, 19 Ala. 274; Branch Bank at Mobile v. Coleman, 20 Ala. 140. Nor was this the only resort which might have been had upon the failure of the judgment creditor to allow the credit according to the contract, and his coercion of its payment. When the plaintiff in the judgment repudiated his contract, there unquestionably sprang up on the other side a corresponding right to abandon the contract and sue upon the account. But while the contract was subsisting, there could be no right of action upon the account. The mutual agreement, that the account should be credited upon the judgment, invested Bower & Co. and Saltmarsh with reciprocal rights; the former to a credit upon the judgment for the amount of the account, and the latter to a discharge of the account. While the contract was subsisting and of force, Saltmarsh had no right to enforce the collection of the entire judgment, and Bower & Co. no right to enforce the payment of the account, either for themselves, or for the use of one to whom they had assigned it after the contract. The right of action, therefore, upon the account, depends upon the abandonment of the contract that it should be credited upon the judgment, after its repudiation by the defendant. The bringing of the action upon the account involves the idea of an abandonment of the agreement, and is the assertion of a right inconsistent with it, and hostile to it. The plaintiff cannot thus abandon the contract, and yet avail himself of the breach of it by the defendant for any purpose. If the agreement was repudiated by Saltmarsh, and the other parties thereupon elected to abandon the contract, and to regard it as rescinded, and accordingly commenced this action, the parties stood as though the agreement had never been made. The plaintiff cannot say, the agreement has been so rescinded that I may maintain my action, yet it stands for the purpose of defeating the defendant's set-off.

An argument may be made, which would address itself



strongly to our sense of justice, to this effect: That Saltmarsh had wrongfully coerced from Smith the payment of a sum of money, equal to the amount of the account, in violation of his agreement, that the judgment should stand credited to the extent of the account. The conclusive reply to this argument is, that if Smith had a right to recover back the money so wrongfully collected from him, it cannot be done in this action, which is predicated upon the account of Bower & Co.

[10.] Record evidence in the case discloses that Smith did make an effort, before the appropriate court, to obtain an allowance of a credit upon the judgment against Bower and himself, for the amount of the account; and that after a trial had in the circuit court, a judgment was rendered against Smith. It is suggested in the argument, that when the charge speaks of the account not being allowed as a credit upon the judgment, it refers to its disallowance by the circuit court at the instance of Saltmarsh, and upon his resistance. As the point will probably arise in the court below upon another trial, we will consider the charge as if its conclusion had been predicated upon a judicial refusal, at the instance of Saltmarsh, to allow the credit. The record discloses that the entire evidence offered by Smith, upon the trial of his application to have the credit allowed, was rejected; and there being no proof before the court, a judgment against Smith was rendered. The correctness of the account was not necessarily involved in the decision against Smith. He could not recover, unless he proved the contract to allow the credit. The judgment, therefore, was not *prima facie* conclusive against the correctness of the account.—Chamberlain v. Gaillard, 26 Ala. 504; Wittick v. Traun, 25 Ala. 317. The judgment in that proceeding cannot be held, upon the record itself, as an estoppel to an action upon the account; but, on the contrary, the successful resistance of Smith's application by Saltmarsh, considered in the light of the record alone, and the subsequent coercion of the payment of the entire judgment, was a repudiation of the contract to allow the credit, and gave the plaintiffs a right to abandon that contract, and to resort to this action, but could

give them no right to take advantage of the contract in this case. On the contrary, the question whether there was a valid agreement that the account should be credited upon the judgment, was necessarily involved in the decision against Smith, on his proceeding to obtain the credit. The making of the agreement was a matter which necessarily pertained to the trial, and the decision against Smith was conclusive upon him that no such agreement had ever been made. Indeed, the trial and judgment in the circuit court, in the proceeding instituted by Smith to obtain a *supersedeas*, is conclusive, in this case, upon the question of an agreement to allow the credit. From this conclusion, as to the effect of the record, it follows that the charge is incorrect, if it be understood to refer to and include in its statements the record in the *supersedeas* proceeding of Smith v. Saltmarsh.

The reasoning which we have employed in reference to the charge given by the court of its own motion, is equally fatal to the charge which was given upon the plaintiffs' request.

[11.] Smith's petition for the *supersedeas* was admissible in evidence, as a part of the record; but it was not evidence of the facts stated in it; and the court should instruct the jury, that it cannot be regarded by them in that light.

The judgment of the court below is reversed, and the cause remanded.

STONE, J., not sitting.

## LUCAS vs. OLIVER.

[BILL IN EQUITY FOR REDEMPTION OF MORTGAGED PROPERTY.]

1. *Sufficiency of averments of bill.*—An averment that the complainant “is informed and believes” that a certain material fact exists, is not equivalent to an averment of the existence of that fact; but an averment of the existence of the fact, “as complainant is informed and believes,” is sufficient.
2. *Alternative averments.*—Where the equity of a bill rests on the existence of one of two facts, which are stated disjunctively, and one of which is not sufficient to uphold the bill, the averment is insufficient.
3. *When mortgage sale will be set aside in equity, on account of trustee's misconduct.* The fact that a trustee, in making a sale of property under a mortgage or deed of trust, knew that the purchaser was bidding for the mortgagee, is not sufficient to induce a court of equity to set aside the sale.

APPEAL from the Chancery Court of Macon.

. Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 18th December, 1852, by Joseph S. Oliver and others, children and heirs-at-law of Whiting Oliver, deceased, against Henry Lucas and James H. Judkins. Its object was to set aside a mortgage sale of a tract of land, and let in the complainants to redeem. The mortgage was executed by said Whiting Oliver, on the 11th September, 1848, to secure said Henry Lucas against his accommodation acceptance of a bill of exchange for \$2,161, drawn by said Oliver on the 12th June, 1848, and payable six months after date; conveyed to James H. Judkins a tract of land containing 320 acres, together with six negroes, the crop of cotton and corn then growing on the land, and all the cattle, sheep and hogs; and authorized him to take possession, on default being made in the payment of the bill at maturity, and to sell so much of the property as might be necessary to pay off the bill, with all incidental costs and charges. The bill of exchange having been paid at maturity by Lucas, in default of payment by Oliver, Judkins took possession of the land and other property, and



sold the same at public outcry on the first Monday in January, 1849, when the land, cotton and corn were knocked down to Thomas Judkins, as the highest bidder, and the cattle, sheep and hogs to one Thomas C. Cliatt. The grounds on which the validity of the sale was attacked by the complainant, were, that Thomas Judkins, in becoming the purchaser, was acting merely as the agent of Henry Lucas; that there was a combination and agreement between said Lucas, Cliatt and Thomas Judkins, prior to the sale, that they should not bid against each other; that in consequence of this agreement, and of the further fact that the property was sold in the city of Montgomery, instead of on the plantation, the prices realized at the sale were greatly below the real value of the property; and that James H. Judkins was privy to this arrangement.

Some of the averments of the bill were made on information and belief, and others simply alleged the complainants' information and belief, as is shown in the following extracts: "They further show, that in bidding for said lands, corn and cotton, they are informed and believe that Thomas Judkins was acting, not for himself, but for said Henry Lucas; and that said Lucas was, in truth and in fact, the purchaser of said lands, corn and cotton, if there was a valid sale thereof." "They further show, that before the said pretended sale by James H. Judkins, the said Lucas, James H. Judkins and Thomas Cliatt, or some two of them, as they are informed and believe, made some arrangement, by which it was agreed and understood that said Cliatt might bid for said cattle, hogs and sheep; and that said Lucas would not bid against him, nor interfere with his getting them at whatever he might bid; and that said Cliatt became the purchaser, under this agreement, of said cattle, sheep and hogs, as aforesaid." "They further show that, as they are informed and believe, under the same agreement and understanding between said Lucas, Cliatt and Judkins, or some other person, to all of which said Lucas was a party, either in person, or through his agent, James H. Judkins, the said Cliatt was not to bid against Lucas, or

whomsoever was bidding for him, for said lands, corn and cotton; and that by this means, and under this understanding, said Lucas, through said Thomas Judkins, became the purchaser of said lands, corn and cotton, if there was in fact any sale, and bought the same for such a low price." "They further show that, at the time said deed was executed, and for a long time before, and ever since, as they are informed, said James H. Judkins was and is the agent of said Lucas, and transacts almost all his business," &c. &c.

The defendants filed separate answers, denying all the charges of fraud, and insisting on the fairness and regularity of the sale; and incorporated in their answers demurrers to the bill for want of equity.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainants, setting aside the sale of the land, ordering an account, &c.; and his decree is here assigned as error.

H. W. HILLIARD, for the appellant.

ELMORE & YANCEY, with WM. P. CHILTON, *contra*.

STONE, J.—It is objected for appellants, that the averments of the bill in this case are not sufficient. The authorities cited in support of this position are, *Jones v. Cowles*, 26 Ala. 614; *Charles v. Dubose*, 29 Ala. 367, and *Read v. Walker*, 18 Ala. 332. The language of the bill, in *Jones v. Cowles*, was, "Your orator further saith, that he is advised and believes that, before the said contract of purchase was consummated, the said Thomas M. Cowles," &c. This was not an averment of any matter as a *fact*, but only that the complainant had received certain advice or information, and believed that information to be true. In other words, he averred his confidence in the truth of the information, which he said he had received. The defendant could have formed a literal issue upon this averment, if he had denied that the complainant had been so *advised*, or had denied that he *believed* the information. In the case of *Charles v. Dubose*, the bill not only failed to aver a sale, but denied that any

had been made. The case of Read v. Walker decides nothing that can benefit the present appellant.

In the present record, the material averments are stated as facts, with the additional words, "as your orator and oratrixes are informed and believe." This is more than an averment of complainants' confidence in the truth of the representations. It avers the facts, and states the source from which the knowledge of those facts was derived. There is nothing in this objection.

The proof in this record fails to establish the averment, that there was any combination, agreement or understanding between Mr. Lucas, or James H., or W. T. Judkins, and any other person, to prevent or embarrass fair competition in the bidding at the sale. We dismiss, then, as unsustained by the testimony, all charges of actual fraud in the sale.

The witness W. T. (or Thomas) Judkins does prove that, at the sale, he, as the agent of Henry Lucas, the beneficiary, bid for and purchased, for Mr. Lucas, the land, the cotton, and the corn; and that, on the day and before the sale, James H. Judkins, the trustee, informed him, W. T. Judkins, that Mr. Lucas desired him to bid for the property for him, Lucas, and to make the land bring \$5 per acre. It is here insisted that this agency on the part of James H. Judkins, the trustee, was incompatible with that strict neutrality which the law required at his hands; and that this, without more, arms the heirs-at-law of Whiting Oliver with the right to have the sale set aside. The strongest authorities in support of this proposition are the following: Bennett, *Ex parte*, 10 Vesey, 381; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. Sup. Ct. 132; 1 White & Tudor's Leading Cases, 160 to 169; Michaud v. Girard, 4 How. (U. S.) 503, 535; Hawley v. Cramer, 4 Cow. 717; Scott v. Freeland, 7 S. & M. 409; Davone v. Fanning, 2 Johns. Ch. 252; McLeod v. McCall, 3 Jones' Law, 87; Lawrence v. Hand, 23 Miss. 103; Beeson v. Beeson, 9 Penn. State Rep. 279; Andrews v. Hobson, 23 Ala. 219; Charles v. Dubose, 29 Ala. 369.

A question arises, however, on the pleadings in this case, which we feel it our duty first to consider.



In *Cressett v. Mitton*, 1 Vesey, jr. 449, the bill was filed to perpetuate a right of common and of way. The charge in the bill was, that the tenants, owners and occupiers of certain lands in a manor, *in right thereof or otherwise*,\* from time whereof the memory of man is not to the contrary, had, and of right ought to have, common of pasture, &c. The bill was held bad on demurrer, because of the words "*or otherwise*." It did not aver that the right of common was *appendant* or *appertenant*, but that it was *that or otherwise*. The court said, this was no specification at all, but left the matter open to any sort of proof. The court added, there must be something substantial; the party must claim something.—See S. C., 3 Bro. C. C. 481; see also, to the same effect, *Ryves v. Ryves*, 3 Vesey, 343; *Wormald v. De Lisle*, 3 Beavan, 18; *Jerome v. Jerome*, 5 Conn. 352; *Story's Eq. Pl. §§ 244, 244 a, 245, 305*; *Gill v. Haywood*, 1 Vern. 312.

In 1 Danl. Ch. Pr. 377, it is said, "care must be taken, in framing the bill, that everything which is intended to be proved, be stated upon the face of it. Otherwise, evidence cannot be admitted to prove it."

The only averment in the present bill, which bears on the question we are considering, is as follows: "And they (orator and oratrixes) also believe, and so charge, that the said James H. Judkins procured or got the said Thomas Judkins to bid for said land, cotton and corn, at the pretended sale, *or* that he at all events knew, and it was understood between him and Henry Lucas, or Thomas Judkins, that Thomas Judkins was to bid for said property for said Lucas; and that, throughout the whole transaction, the said James H. Judkins acted, not as a trustee for all parties, and taking care of the interest of all, but in part alone as the trustee and agent of Lucas alone, and with a special eye to the interest of Lucas; and his conduct in this behalf, and in the business, has been a fraud upon your orators."

It is, perhaps, needless to say that the concluding part of the above extract, commencing with the words, "and that throughout the whole transaction," &c., contains no substantive averment of fact, or abuse of trust or confi-

dence, on which equity could or would grant relief. It is a mere general statement of a conclusion, omitting all mention of particulars.

The averment, then, reduces itself to an alternate statement of one thing or another; viz., that James H. Judkins, the trustee, procured Thomas Judkins to bid for the property, *or* that he, James H., knew that Thomas Judkins was to bid for the property for Lucas. Even this last alternative averment is made disjunctively—viz., that he, James H., knew, and it was understood between him and Henry Lucas, *or* between him and Thomas Judkins, that the said Thomas was to bid for said property for said Lucas.

Without intending, in this opinion, to commit ourselves on the question, whether, in such case as this, it is sufficient to aver alternatively that the wrong or fraud complained of was perpetrated either by one instrumentality or another, it is manifest, that if such form of pleading be resorted to, under the rule which requires the pleader to show by his pleadings that he has a right to the relief he prays, and which forbids us to presume in favor of the bill the existence of material facts not averred, no relief can be granted, unless each branch of the disjunctive averment set forth a ground for equitable interposition. The last branch of this averment, namely, that James H. Judkins, at the time of the sale, knew that Thomas Judkins was bidding as the agent of Henry Lucas, certainly offers no sufficient reason for setting aside the sale. Indeed, the complainant does not contend for such a proposition.

It will be observed, that the second alternative averment of the bill is, that the trustee knew, and it was understood between him and Henry Lucas, or Thomas Judkins," &c. It may be contended, that the word *understood* amounts to a charge that the trustee participated actively in the arrangement under which Thomas Judkins made the purchase. In the various definitions given by lexicographers to the verb *to understand*, none of them implies a contract or agreement. Understanding is a mental operation, and does not require either word or

action in the person possessing it to render it complete. A full and complete denial of this charge may be made, without mention of any contract or agreement in which the trustee participated. On the other hand, Mr. Lucas and Thomas Judkins may have agreed that the latter should purchase for the former; that agreement and its terms may have been fully understood by the trustee; and yet that could not, without more, affect the sale. An averment thus ambiguous and indeterminate is not sufficient as a foundation for relief in chancery.

Inasmuch as all the charges in the bill which impute to the trustee actual fraud, or which complain of combination and collusion between him and the purchaser or his agent, fail for want of proof; and inasmuch as the bill contains no sufficient averment to let in the proof of the trustee's interference or agency, in having the purchase made for Henry Lucas, the beneficiary, it results that the decree of the chancellor must be reversed. We will not, however, finally dispose of the case, but will remand it, that the chancellor may consider and pass upon such motions as may be submitted for his consideration.

In the present condition of the record, we deem it improper to pronounce on the effect of the evidence. Should an amendment of the pleadings be allowed, the evidence before the court may not be the same; and if it should be, its effect as proof may be changed by some new aspect of the pleadings.

We take occasion to state, also, that we carefully withhold any expression of opinion at this time, on the phase of the case which, it is contended, Thomas Judkins' testimony establishes. It will be time enough to pronounce upon it, when it comes legitimately before us on a correspondence of averments and proof.

The decree of the chancellor is reversed, and the cause remanded.



BELL *vs.* THOMPSON.

[BILL IN EQUITY BY PURCHASER FOR ABATEMENT OF PURCHASE-MONEY, AND PARTIAL SPECIFIC PERFORMANCE.]

1. *When purchaser may obtain compensation, or abatement of purchase-money.*—The doctrine is now well settled in this State, that a purchaser cannot come into equity, to obtain compensation, or an abatement of the purchase-money, on account of a deficiency in the quantity of the land, or the fraudulent misrepresentations of his vendor as to its quantity or quality, unless his bill also shows some other independent ground of equitable relief.
2. *Partial specific performance.*—If the purchaser, having entered into the contract in ignorance of his vendor's incapacity to give him the entire tract of land, chooses afterwards to take as much as he can get, he has a right to insist on a specific performance to that extent, with compensation, or an abatement of the purchase-money, for the deficiency.
3. *Allegations of bill for specific performance.*—In a bill for specific performance, the complainant must show, not only that he has performed, or offered to perform, the acts which formed the consideration of the contract on his part, but also that he demanded performance by the defendant before filing his bill, and that the latter refused to comply with such demand.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 23d March, 1858, by William M. Bell, against Robert Thompson. Its material allegations were these: That on the 27th September, 1854, the complainant purchased from said Robert Thompson a tract of land in Tallapoosa, at the price of \$6,000; that he paid a part of the purchase-money in cash, and executed his three promissory notes for the balance, according to the terms of the contract, and received from Thompson a bond conditioned to make titles to the land on the payment of the notes; that the negotiation was conducted on the part of Thompson by one Elijah Thompson, his agent, who represented the tract as containing three hundred and twenty acres, "two hundred acres of which consisted of rich, tillable, bottom lands, lying on the west bank of the Tallapoosa river, in the south half of section 28, township 16, range 10, east;" that the com-

plainant was ignorant of the quantity and boundaries of the land, and confided in the representations of said Elijah Thompson, which were afterwards re-affirmed by his principal; that he discovered, soon after taking possession of the land, that one Frederick Ross claimed and had possession, under a prior deed from Thompson, of ten or twelve acres on the west side of the Tallapoosa river, which were embraced in his title-bond from Thompson; that he then had the tract of land surveyed, and found there were only one hundred and fifty-three acres in the south half of section 28; that he immediately wrote a letter to Thompson, stating these facts, "and asked him to come up and make a fair and honest settlement of the matter, without any law-suit or difficulty;" that Thompson came to see him about the matter, "but, contrary to his hope and desire, refused to make any settlement, or any reduction of the purchase-money, on account of the deficiency in the land;" that complainant had paid all the purchase-money, except a balance of \$500 or \$600, which was less than the amount of damages due on account of the deficiency in the quantity of the land; and that Thompson had instituted an action at law against him on the unpaid note, to recover that balance.

The prayer of the bill was, that the action at law might be enjoined; that the purchase-money agreed to be paid might be abated to the amount of damage sustained by the deficiency in the quantity of land; that if it were ascertained, on a proper accounting, that the complainant had overpaid the value of the land, the defendant might be required to refund the excess; that the title to the land might be divested out of the defendant, and vested in the complainant; and that such other and further relief as the nature of the case demanded might be granted.

The chancellor dismissed the bill, for want of equity, on the ground that the complainant had a complete remedy at law; and his decree is here assigned as error.

G. C. WHATLEY, for appellant.

JAS. B. MARTIN, with HEFLIN & FORNEY, *contra*.

R. W. WALKER, J.—If the bill is to be considered as having no other purpose than to obtain, by way of equitable set-off to the demand sued on in the circuit court, an abatement of the purchase-money, on account of the misrepresentations of the defendant as to the quantity of land sold, it fails to make out a case of which, under the circumstances, chancery has jurisdiction. Under the Code, (§ 2240,) the claim of the complainant for an abatement of the purchase-money, or for damages on account of such misrepresentations, may be allowed as a set-off in the action at law; or it may be recovered in an independent suit at law against the vendor.—*Holley v. Younge*, 27 Ala. 203; *Gibson v. Marquis*, 29 Ala. 668; *Munroe v. Pritchett*, 16 Ala. 785. It is now the well-settled doctrine of this court, that a court of equity will not take jurisdiction of a case, upon the mere ground that the complainant is entitled to compensation on account of a deficiency in the land sold, or to damages for the fraudulent misrepresentations of the vendor, either as to its quantity or quality. Such a claim, though well founded, is not recognized as an independent ground of equitable relief; and will not be enforced by a court of chancery, except as an incident to some other matter of equitable cognizance, or in cases where the remedy at law is inadequate, or where some peculiar equity in favor of the complainant arises out of the circumstances of the case. For example, where the complainant shows a right to a specific performance of the contract of sale, the court thereby acquires jurisdiction over the whole matter, and can deal with any question of damages arising from a breach of the agreement. In like manner, where the insolvency of the vendor is shown, or where the injury sustained is of such a character as not to admit of reduction to a money value, the court of chancery will intervene and afford the needed relief.—*Crawford v. Allen*, at this term; *Harrison v. Deramus*, 33 Ala. 463; *Sims v. McEwen*, 27 Ala. 184; *Betts v. Gunn*, 31 Ala. 222; *Russell v. Little*, 28 Ala. 163; *Woodman v. Freeman*, 25 Maine, 531; *Prothero v. Phelps*, 35 Eng. Law & E. 523.

[2.] Such is the general principle; and accordingly, if



this bill shows nothing beyond a well-founded claim to damages, or compensation, it fails to make out a case for equitable relief. It is said, however, that upon the facts stated, the defendant is unable to execute his contract as to that part of the land previously sold by him to Ross; and that the allegations of the bill are sufficient to show that the complainant is entitled to a decree for the specific performance of the contract, so far as the defendant can execute it, with compensation, or an abatement of the purchase-money, for the deficiency. If this position can be sustained, the bill does establish a ground of equitable jurisdiction, as incidental to which the court would give the complainant the benefit of any well-founded claim he may have to compensation or damages. Although a purchaser cannot have a partial interest forced on him; yet, if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterwards to take as much as he can get, he has a right to insist on that, with compensation, or an abatement of the purchase-money, for the deficiency.—*Weath-erford v. James*, 2 Ala. 173; *Mortlock v. Buller*, 10 Ves. Jr. 315; *Graham v. Oliver*, 3 Beavan, 128; *Jacobs v. Locke*, 2 Ired. Eq. 286; *Henry v. Liles*, *ib.* 407; *Ketchum v. Stout*, 20 Ohio, 453; *Harben v. Gadsden*, 6 Rich. Eq. 284; 2 Story's Eq. § 779.

[3.] In *Long v. Brown*, 4 Ala. 626, this court, in reference to a bill for the reformation of a contract, said: "There is neither reason nor propriety in seeking the expensive aid of the chancery court, to do that which the vendor was willing to do voluntarily. To give a court of equity jurisdiction to enjoin a judgment at law until a mistake of this kind could be rectified, application should have been made to the vendor to make it, and on his refusal, the court would interfere, if necessary, to prevent an injury from that cause." We think, that the rule here stated is equally applicable to bills for specific performance; and that in such cases, the complainant should not only show that he has performed, or offered to perform, the acts which formed the consideration of the undertaking sought to be enforced, but that, before the

filing of his bill, he had demanded the performance of the contract by the defendant, and that the latter had refused to comply with such demand.

It may be that, under the authority of *Elliott v. Boaz*, 9 Ala. 779, the allegation of facts which show that such a demand on the part of the complainant would have been refused, would be deemed equivalent to an averment that the demand had been in fact made and rejected. But the allegations of the present bill, upon this point, are insufficient, even under the rule as thus qualified. The bill, if considered as a bill for specific performance at all, is not for the entire performance of the contract, but for its performance only so far as the defendant is able to execute it. The allegation which is relied on, as showing that a demand for such performance as is sought by the bill would have been refused, and was therefore not necessary, is in these words: "Your orator, hoping to be able to adjust the matter amicably, addressed the said Thompson by letter, and stated there was a deficiency in the quantity of land sold, and that the said Ross had possession of ten or twelve acres of the land he had described in his title-bond to your orator, and asked him to come up and make a fair and honest settlement of the matter, without any law-suit or difficulty. The said Thompson came to orator's residence, and acknowledged he had received orator's letter upon the subject; but, contrary to orator's desire and hope, the said Thompson refused to make any settlement, or any reduction of the purchase-money, on account of the deficiency in the land heretofore set forth."

Now, if it be conceded that, with the view of entitling him to a conveyance of all the land, except that to which the defendant had no title, the complainant was bound to tender only so much of the purchase-money as would remain due after deducting a ratable proportion for the land which the defendant could not convey; still we do not think that the foregoing allegation shows with sufficient certainty that a demand for such a conveyance would have been refused by the defendant. All that is shown is, that he "refused to make any settlement,

or any reduction of the purchase-money, on account of the deficiency in the land." But it does not appear that complainant ever offered to accept from the defendant a conveyance of less than the entire tract named in the title-bond. If the complainant had proposed to accept of such partial performance, and to release the defendant from his obligation to convey the entire tract, *non constat*, that the latter would have refused to allow an abatement for the deficiency. It is obvious that the complainant could not demand, as a right, the abatement of the purchase-money, and at the same time compel the conveyance of the whole land. For aught that appears from the bill, the refusal of the defendant to make the reduction may have been founded upon his unwillingness to take less than the entire purchase-money which the complainant had contracted to pay, unless the latter would release him from the obligation to convey that part of the land, the failure of title to which formed the ground on which the abatement was claimed. The allegation as made does not necessarily involve the proposition, that the defendant would have refused to convey so much of the land as he could convey, if the complainant had made such a demand. Hence, if we consider this as a bill for partial specific performance, it is without equity, because it fails to show with the requisite certainty that the defendant would not have done without a suit that which the complainant calls upon the court to compel him to do.

Decree affirmed.

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### DICKINSON vs. LEWIS, GARTHWAITE & CO.

[BILL IN EQUITY TO OPEN STATED ACCOUNT ON GROUNDS OF FRAUD AND MISTAKE.]

1. *When equity will open stated account.*—Where errors have occurred in a stated account, in consequence of a fraud, a court of equity has jurisdiction to re-examine the entire account, or to allow the injured party to surcharge



and falsify it as to specified errors ; but this principle only applies to those accounts of which, before they were stated, equity would have taken jurisdiction.

2. *When equity has jurisdiction of matters of account.*—Equity will not take jurisdiction of an open account between a merchant and a manufacturer, which consists simply of items for goods sold and furnished by the latter, under a special contract, at a specified price, and credits for payments made by the former.
3. *When equity has jurisdiction on ground of fraud.*—If a debtor gives his note for the amount of his account as stated by his creditor, containing a fraudulent overcharge of a specified item, his remedy at law against the note, on account of the fraud, being full, adequate, and complete, he cannot come into equity for relief; and this, notwithstanding the account was contracted partly with two successive firms.
4. *When equity has jurisdiction on ground of discovery.*—To maintain a bill on the ground of discovery alone, it must appear that the facts as to which a discovery is sought are material in making out the right to relief; consequently, where the only relief sought is in reference to an alleged overcharge of five per cent., in addition to costs and expenses, for goods furnished by defendant to plaintiff under a special contract, the bill cannot be maintained on the ground of discovery as to “the various items of expense involved in the original cost and manufacture of the goods.”

• APPEAL from the Chancery Court of Mobile.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Charles B. Dickinson, the appellant, against William M. Lewis, William Grant, John Van Barclome, and Caleb C. Garthwaite, partners in trade under the successive firm names of Lewis, Grant & Co., and Lewis, Garthwaite & Co.; and alleged, in substance, the following facts:

In June, 1848, Dickinson, who was a clothing-merchant in Mobile, entered into a contract with Lewis, Grant & Co., who were manufacturers of clothes in the cities of New York, Newark, and New Orleans, to this effect: that said Lewis, Grant & Co. would furnish and manufacture articles of clothing for him, as he might from time to time order them, at a profit of ten per cent. on the original cost when shipped from New York or Newark, and of twelve per cent. when shipped from New Orleans. Under this contract, from 1848 until 1854, large quantities of goods were manufactured and furnished to Dickinson by Lewis, Grant & Co., and by Lewis, Garthwaite & Co., their successors in business. On the 7th August, 1854, a

settlement was had between the parties, when it appeared from the account stated by Lewis, Garthwaite & Co., that Dickinson was indebted to them in the sum of \$28,926 11; for which amount Dickinson then executed and delivered to them his ten promissory notes, for different amounts, payable at six, eight, ten, fifteen, seventeen, eighteen, twenty, twenty-two, twenty-seven, and twenty-nine months, respectively. After Dickinson had paid five of these notes, as he alleged in his bill, "reliable information was first given him of the fact, that said defendants, throughout the whole duration and range of his dealings with them, had uniformly and covertly violated their said contract in every item of charge made against him for goods bought and manufactured as aforesaid; which breach consisted in incorporating generally, and without any discriminative specification whatever, into every such item of their invoice accounts rendered him during their said dealings, an additional and gratuitous charge of five-and-a-half per cent., or five and six-tenths per cent.; the said unexplained item including, in each instance, the original cost of the purchase and manufacture of the particular article charged, a wholly unauthorized addition thereto of five per cent. thereon computed, and ten or twelve per cent., according to the place of shipment, superadded to the sum thus obtained." In the fall and winter of 1852, and in the spring of 1853, the complainant having failed to forward any special order for goods, the defendants shipped to him, without reasonable notice, an unusually large quantity of goods, which he was unable to sell on profitable terms; and they thereupon proposed to him, that he should sell these goods at prime cost, and they would allow him ten per cent. on the proceeds of his sales. Under this arrangement, complainant sold about \$5,000 worth of the goods; but the defendants refused to allow him any credit on that account. The amount actually due to the defendants, on a proper accounting, having been fully paid by complainant, he refused to pay the remaining notes; and the defendants thereupon instituted an action against him on said notes, in the city court of Mobile.

The prayer of the bill was, that the action at law might be enjoined; that the defendants might be required to discover, under oath, "each and all the items of expense whatever included in the original cost and manufacture of all the goods furnished by them under said contract, distinctly discriminating such as are embraced in said five and five and six-tenths per cent. from the remainder, and to produce before the master all the books of original entry in their possession wherein the same are recorded;" that an account might be taken of all the dealings and transactions between the parties; that the promissory notes might be delivered up and canceled; that the defendants might be decreed to pay over to the complainant whatever balance might be found due him on a proper accounting; and for other and further relief.

After the coming in of the answer of Lewis, Garthwaite & Co., the chancellor dissolved the injunction, on motion, and dismissed the bill for want of equity; and his decree is now assigned as error.

A. J. REQUIER, for appellant, contended, that the bill contained equity, on the following grounds:

1. On the allegation of fraud in the statement of the accounts, which was carried into the notes given for the ascertained balance.—1 Story's Equity, § 523; Kirkman v. Vanlier, 7 Ala. 224; Rembert & Hale v. Brown, 17 Ala. 670.

2. Because of the complicity of the matters of account, involving over \$250,000, embracing numerous and diversified details, and extending over a period of more than six years.

3. On the ground of discovery.—2 Story's Eq. § 1485; Code, § 2935.

4. Because the plaintiffs in the action at law on the notes were not the only parties implicated in the alleged fraud.—2 Story's Equity, § 885; 3 Dan. Ch. Pr. 1843-44.

P. & T. A. HAMILTON, *contra*, insisted,—

1. That the entire relief sought by the bill amounted only to a partial failure of consideration, which was available as a defense at law to the action on the note.



2. That the bill could not be maintained on the ground of discovery alone.—19 Ala. 687 ; 29 Ala. 337 ; 10 Peters, 497.

A. J. WALKER, C. J.—The account against the complainant has been stated, and settled by his execution of notes for the balance found against him. To open this stated account, and correct its errors, is the object of the bill. Where errors have occurred in a stated account, in consequence of a fraud, equity has jurisdiction to open the account, and will either re-examine the entire account, or allow the injured party to surcharge and falsify it as to specified errors.—Cowan v. Jones, 27 Ala. 317 ; 1 Story's Eq. Jur. § 523. The accounts which, when stated, the court will open, must, however, be understood to be such as fall within the jurisdiction of the chancery court. The power to open stated accounts for re-examination, or for surcharge and falsification, belongs to the jurisdiction over matters of account, and grows out of it. The court can not have jurisdiction to open and re-examine, or to correct the errors of a stated account, when the account, before it was stated, did not pertain to the jurisdiction of that tribunal. If, therefore, the original account, the alleged errors of which the complainant seeks to correct, would not have been a matter over which the court of chancery could exercise jurisdiction, then the opening of that account after being stated, for re-examination, or for surcharge and falsification, is without its jurisdiction.

[2.] The account against the complainant was not such as appertained to the jurisdiction of the chancery court. If either party had appealed to that court, before the account was stated between them, to have the balance ascertained, the cause would have been repudiated. This will be apparent from an observation of the character of the account, in connection with the principles which control the equity jurisdiction over the subject. The account was for clothes furnished to the complainant during a series of years, and differs from the ordinary accounts of merchants in this, that the rate of charging was controlled by a contract made at the inception of the

account. There was no mutuality of accounts. On the complainant's side there was only a claim of credits for payments made. The engagement with the complainant by his creditors, to make a deduction of 10 per cent. on the price of certain goods sold by the former at cost, was but a modification of the price of those particular goods, and gave rise to no mutuality of account. There was nothing more, therefore, than an account on one side, with credits for payments made. Of such an account chancery has not original and independent jurisdiction. There was a plain, adequate and complete remedy at law, for the enforcement of his demand by the creditor, and for the assertion by way of defense of all his rights by the debtor.—1 Story's Eq. Jur. § 459; *Kirkman v. Vanlier*, 7 Ala. 217; *Crothers v. Lee*, 29 Ala. 337; *Rembert & Hale v. Brown*, 17 Ala. 667.

It is true that chancery sometimes takes jurisdiction where there is no mutuality, on account of its complication; but it only does so where there is a strong case of entanglement.—*Phillips v. Phillips*, 12 Eng. L. & Eq. 259; S. C., 9 Sim. 471; *Padwick v. Stanley*, 12 Eng. L. & Eq. 281; S. C., 9 Sim. 627. This account certainly does not present that strong case of entanglement, or complication, which is necessary to maintain the equity jurisdiction.

The conclusion deduced from what is above said is, that the equity of complainant's bill cannot be sustained, merely upon the ground of the chancery jurisdiction to open a stated account, and re-examine, or allow a surcharge and falsification of it.

[3.] Fraud is, of itself, a ground of equity jurisdiction. But this rule is not universal in the jurisprudence of England, or in any of the United States. The doctrine of this court is, that notwithstanding the fraud, "if the party can have full, complete and adequate redress at law, he can not go into chancery."—*Knotts v. Tarver*, 8 Ala. 743; *Russell v. Little*, 28 Ala. 160. By that doctrine, as expounding a just and convenient rule, too long recognized in this State to be lightly departed from, we will abide, without inquiring whether it harmonizes with all

the decisions upon the subject. The fraud which the complainant alleges, is confined to the making of a charge of five per cent. upon the actual cost of the material and making of the clothes furnished to him. The precise amount of variation which this fraud produced on the settlement, from the true amount of complainant's indebtedness, is alleged, and its ascertainment involves only a simple arithmetical calculation, which can as well be made in a court of law as in a court of chancery. This allegation of fraud is determinable by inquiring, what was the contract as to the rate of charges? what was its legal effect? and have the defendants covertly and fraudulently violated it? This inquiry a court of law is as competent to make as a court of chancery. There is, then, nothing in the nature of the fraud, or in the inquiries to which it gives rise, which affords a reason why complete and adequate redress can not be had at law.

The case made by the bill is simply one where creditors have fraudulently embraced in their account against a debtor an erroneous charge, for which the debtor has given his notes. His defense is obviously at law, upon the simple ground of a want of consideration as to a part of the amount for which the notes were given. The complainant's remedy, by defending against the notes at law, was not the less complete and adequate, because the account for which the notes were given had been contracted with two partnerships, one succeeding the other in business, and differing from each other somewhat as to the persons who composed them. To the defense of a want of consideration for the note, the parties to whom the notes are payable, and with whom the settlement of the entire account was made, could not object that a part of the account was contracted with their predecessors. No recovery could be had, at law, for any part of the notes which was founded in fraud, and unsupported by a consideration, whether the account was originally made with the payees, or with their predecessors in business. Such a fraud and want of consideration would be as available against the party to whom the notes were given, as



against the party with whom the account was originally contracted.

[4.] The remaining point of view, in which it is claimed that the bill contains equity, is that it has the allegation necessary to make it a good bill of discovery. The chancery court has jurisdiction, and will grant relief, where an account is to be taken, and there is no mutuality of account, if "a discovery is wanted in aid of the account, and is obtained."—1 Story's Eq. Jur. § 458. But, to the maintenance of the bill upon the ground of discovery, it is not sufficient simply to allege that there are facts of which the complainant can not make proof without a discovery; it must appear that those facts are *material* in making out the right to relief.—Saltmarsh v. Bower, 22 Ala. 227; 2 Story's Eq. Jur. § 74; Lucas v. Bank of Darien, 2 St. 280; Horton v. Moseley, 17 Ala. 794; Perine v. Carlisle, 19 Ala. 686; Crothers v. Lee, 29 Ala. 338. The only allegation in the bill, as to the complainant's inability to make proof, is in the following words: "Your orator further sheweth, that he has no adequate means of establishing at law, or otherwise, the *various items of expense involved in the original cost and manufacture* of all the goods so furnished him as aforesaid by the defendants, up to the time of said settlement; that the same is almost exclusively within their knowledge, and embraced in their books of original entry; and that it is indispensable to the maintenance of his claim, that they should make a full and particular discovery of each and every one of said items, under oath, distinctly discriminating such as are embraced in the per centage objected to from the remainder, and that all the said books should be produced." The bill does not allege any error whatever in the charges for the original cost and manufacture of the goods, but that without any authority, and in violation of the contract, five per cent. was added to the cost and manufacture of the goods. Upon the case made by the bill, it was, therefore, totally immaterial to inquire about the cost of the material and manufacturing. That was a matter entirely outside of the litigation commenced by the bill; and when the inability to make proof as to

that matter is shown, the necessity of discovery as to a material matter does not appear. The bill carefully excludes the idea, that any portion of the cost of the materials and manufacture was embraced in the fraudulent and unauthorized charge of five per cent. From this it results, that it is not a question of the case made by the bill, whether the five per cent. did not, in part, cover some of the items of expense in the purchase of materials and manufacture of the clothes.

There is no equity in the bill in any aspect, and the chancellor's decree must be affirmed.

## HUCKABEE'S ADM'R vs. ANDREWS.

[PROCEEDING BY WIDOW FOR RECOVERY OF DISTRIBUTIVE SHARE OF ESTATE OF DECEASED HUSBAND.]

1. *Wife's interest as distributee in estate of deceased husband.*—In estimating a widow's distributive interest in the estate of her deceased husband, (Code, §§ 1991-92,) property secured to her sole and separate use under the provisions of her father's will is not to be considered as a part of her separate statutory estate; *secus*, as to slaves received by her under the allotment of the commissioners appointed to divide her father's estate, in payment of a sum of money which he held as her trustee under the will of her grandmother, and which was not bequeathed to her sole and separate use.
2. *Bequest construed not to create separate estate in wife.*—Where a testatrix devised and bequeathed one-fourth part of her entire estate to each of her sons and sons-in-law, as trustee, "upon the following uses and trusts"—viz., to the first, "that he shall take possession of the same at my death, and have and hold it for the sole use, benefit and behoof of his five children;" to the second, "that he shall take possession of the same at my death, and have and hold it for the sole proper benefit, use and advantage of his six children;" to the third, "that he shall take possession of the same at my death, and have and hold it to the only proper use, benefit and advantage of his three youngest children;" and to the fourth, "that he shall take possession of the same at my death, and have and hold it to the only proper use, benefit and advantage of his children,"—held, that a grand-daughter who claimed under the second clause, and who was unmarried at the death of the testatrix, did not take a separate estate in the property bequeathed to her.

## APPEAL from the Probate Court of Greene.

IN the matter of the estate of George F. Huckabee, deceased, on the petition of his widow (now Mrs. Harriet H. Andrews) for her distributive share of the estate. The decedent was married to the petitioner in January, 1842 (?) and died in March, 1851. The only controversy in the case was in reference to the title by which the petitioner held certain slaves, to-wit, Bob, Dolly and child, Miles, Irene and Rose; the question being whether they constituted a part of her separate statutory estate. The probate court ruled that these slaves did not constitute a part of her separate statutory estate, and its ruling is here assigned as error.

S. F. HALE, and WM. M. BROOKS, for appellant.

WM. P. WEBB, *contra*.

STONE, J.—The arguments of counsel narrow our labors in this case to a single inquiry: Did Mrs. Andrews acquire the slaves Bob, Dolly and child, Miles, Irene and Rose, under the will of her grand-mother, Mrs. Ann Davis, or under the will of her father, W. J. Croom? If she acquired this property from Mrs. Davis, then it is governed by the statutes securing to married women their separate estates; if from her father, then it is not governed by said statutes; for, by the will of her father, the property given to her was, in express terms, secured to her sole and separate use. If this property came to her under her grand-mother's will, then, under the Code, (§§ 1991, 1992,) it should be estimated in the allotment of her distributive share in her husband's estate.—See *Smith v. Smith*, 30 Ala. 642.

The facts of this case may be thus stated: Mr. Croom, at the time of his death, was trustee for his daughter, Mrs. Andrews, so constituted by the will of Mrs. Davis; and, as such trustee, had in his hands, belonging to her, a money fund, which was after his death ascertained to be about \$3,500. Mr. Croom had several other children, some of whom were entitled to a legacy under Mrs.



Davis' will, and others had been advanced by Mr. Croom himself. Others of his children had not been advanced. In the disposition of his property by will, he expressed a desire and intention to equalize, as nearly as he could, the fortunes of his children. The advancements he had himself made to several of his children, he set down at the equivalent of seven average working hands. He directed that his children who had not been advanced should have assigned to each of them seven average working hands, and that such as had been partially advanced should have the advancements increased up to the like standard. Four of his children, including Mrs. Andrews, had received property under the will of their grandmother. The language of a codicil to Mr. Croom's will, in reference to this class of his children, is as follows: "I do hereby alter the seventh clause of my said will, and desire that such of my children to whom, by the provisions of said clause, such a lot of negroes are to be set apart as shall be equal to seven average working hands, and as also in the eighth clause of my said will are recited to have had a bequest or bequests made to them by the will of my mother, or to whom a deed of gift, as in said eighth clause is mentioned, was made by myself, that those children, instead of having seven average working hands set apart for them, shall have set apart to each of them such a lot of negroes as, together with the property each of said children shall then hold under the said will of my mother and the said deeds of gift in the said eighth clause mentioned, shall be equal to seven average working hands." He then directed, that the values of the property held by his children under his mother's will, and under the deeds of gift, should be ascertained by the commissioners appointed to divide and allot his property, for which he had made provision in his will.

After the probate of Mr. Croom's will, commissioners were appointed to carry out and perfect its provisions. They reported that Mrs. Andrews had received slaves, (Emanuel, or George, and Mary Davis,) under Mrs. Ann Davis' will, of the value of \$1,550; and there was wanting to make her property, thus received, equal to the value

of seven average working hands, the further sum of \$3,350. This, it will be observed, was less than the money debt due from the estate of Mr. Croom, as trustee, to Mrs. Andrews. The commissioners thereupon allotted to Mrs. Andrews, out of the estate of Mr. Croom, the slaves Bob, Dolly and child, Miles, Irene and Rose, and \$100 in money, which they valued at \$3,550; added to the \$1,550, making \$4,900, the value of seven average working hands. The said slaves and money were turned over to Mrs. Andrews, and received by her; and the commissioners reported, that "these receipts by her are in full of her claim upon Wiley Croom's estate, for her interest under Mrs. Davis' will."

It is manifest, that neither the executor, nor the commissioners, had any authority, if the question were before us, to pay the money debt of Mr. Croom's estate in property belonging to the estate. This mode of payment, however, seems to have been resorted to by consent. This being the case, we find nothing in the proceedings in the probate court, or in the will of Mr. Croom, which authorizes us to hold that the title of Mrs. Andrews to this property is controlled by the provisions of his will. Property was paid and received, not as property bequeathed by the will, but as a substitute for money in the payment of a debt. If it was not so paid, then the debt of \$3,500, which Mr. Croom owed his daughter, has not been paid, but still stands against his estate. If it was not so paid, then the slaves, Bob, Dolly, &c., were improperly allotted to Mrs. Andrews; for, under the will of her father, she was only entitled to have set apart to her such lot of negroes as, together with the property derived from her grand-mother's will, would make her share equal to seven average working hands. To hold that it was not so paid, would falsify the report of the commissioners, who certified that Mrs. Andrews received this property *in full of her claim upon Wiley Croom's estate, for her interest under Mrs. Davis' will.*

We hold, that the probate court erred in not estimating the value of Bob, Dolly and child, Miles, Irene and Rose, as a part of Mrs. Andrews' separate statutory estate, in

graduating the amount to which she was entitled as distributee in Mr. Huckabee's estate.

Reversed and remanded.

[2.] When this case was argued, no question was raised as to the construction of Mrs. Anna Davis' will. The argument, both oral and written, seemed to concede that the words of her will, unaided by our statutes enacted since that will became operative, did not exclude the marital rights of Mr. Huckabee, the first husband of Mrs. Andrews. Since writing the foregoing opinion, an additional brief has been submitted for the appellee, which takes the ground, that the slaves Bob, Dolly and child, Miles, Irene and Rose, even if acquired under the will of Mrs. Davis, are made the separate estate of Mrs. Andrews by the terms of that instrument.

In the case of *Johnson v. Johnson*, 32 Ala. 637, speaking of this subject, we said: "The exclusion [of the husband's marital rights] is not to be inferred from doubtful and equivocal expressions. The court is not to speculate upon what the probable object of the donor was; nor can it base a conclusion, adverse to the husband's interest, upon a possibility or probability. The tendency of modern decisions is not to relax, but to restrict the rule." See the numerous authorities cited and commented on in that opinion.

The settled rule is, that to constitute a separate estate, the intention to exclude the marital rights of the husband must be clearly expressed. No technical words are necessary to effect this object, but any words, which *clearly express* the intention, are sufficient. It results necessarily, as a corollary from this, that if the words employed do not clearly express the intention to exclude the husband's rights, they must be held insufficient.

It is also settled, that when the grant or bequest is to an unmarried female, stronger and less equivocal language is required, than if the grantee or legatee be, at the time, a married woman.—*Cuthbert v. Wolfe*, 19 Ala. 373; *Gould v. Hill*, 18 Ala. 84; *Ozley v. Ikelheimer*, 26 Ala. 332.

It is a cardinal principle in the construction of wills, to



look, if necessary, to the whole instrument, in order to find out the meaning of a particular clause.—Capel's Heirs v. McMillan, 8 Porter, 197; Leavins v. Butler, *ib.* 380; Stallworth v. Stallworth, 5 Ala. 143; Vanzant v. Morris, 25 Ala. 285; Thrasher v. Ingram, 32 Ala. 645.

The will of Mrs. Davis divided her estate into four equal parts, and, overleaping her children, gave the property, by four separate clauses, to as many classes of her grand-children. The first and second clauses, so far as the question we are considering is concerned, are substantially alike; each giving a fourth of her estate to each of her two sons, Jesse H. Croom and Wiley J. Croom, *in trust*, and expressly naming them *my* [her] *lawful trustees*. The language of the clause to Wiley J., under which clause Mrs. Andrews claims, is as follows: "Upon the following uses and trusts—viz., that he shall take possession of the same at my death, and have and hold the same for the sole, proper benefit, use and advantage of his six children, Wiley T. Croom, John L. Croom, Sylvester P. Croom, *Harriet H. Croom*, Mary L. Croom, and Susan J. Croom, to them, their administrators and assigns, as tenants in common."

The other two clauses likewise appoint trustees, and convey the property upon "*the following uses and trusts, and none other*—viz., to have and hold the same to the only, proper use, benefit and advantage of his three youngest children," &c. In each of the four classes of legatees, are both males and females, and no distinction is attempted as to the manner of their holding.

If the words *sole* and *only*, when applied to the female legatees, be held to be words of exclusion, they must have the same signification when applied to the male legatees. If so applied, they lead to a most absurd result.

We think the words *sole* and *only* are used convertibly in this will, and that the only purpose of their employment was to exclude all beneficial interest in the trustees named. We feel justified in this legal conclusion, by the fact that, at the time this will was executed, Mrs. Andrews, and doubtless others of the legatees, were unmarried,—in fact, were mere children; and the possession and

control of the property was, for a time, committed to the several trustees.

We have examined the case of *Anderson v. Brooks*, (or *Hooks*,) 11 Ala. 953. In that case, Mrs. Harris, the beneficiary, was a married woman; and it does not appear that any of her children were males. There may, also, be other differences. It is manifest, however, that the question we are considering was not noticed in that case.

We adhere to our conclusion announced above, that the judgment of the probate court must be reversed, and the cause remanded.

### SHEPPARD vs. SHELTON.

[ACTION ON SHERIFF'S OFFICIAL BOND.]

1. *Waiver of error in sustaining demurrer to complaint.*—If the plaintiff amends his complaint, after demurrer sustained to the original, and proceeds to trial on it as amended, he thereby waives his right to review on error the ruling of the court sustaining the demurrer.
2. *Place of selling property under execution.*—In an action on a sheriff's official bond, against him and his sureties, to recover damages for his wrongful act in selling cattle under execution at a place not authorized by law, (Code, § 2416,) a plea in bar, averring that the place where the cattle were sold was "a place in the neighborhood where they were levied on, and the most convenient place thereto at which they could be sold for the best price," presents a full defense to the action.
3. *Trespass ab initio by abuse of legal process.*—If a sheriff sells the entire interest in a chattel belonging to two joint owners or tenants in common, under execution against one of them, he is liable as a trespasser *ab initio* at the suit of the other, but not at the joint suit of both.
4. *Misjoinder of parties plaintiff.*—Where the entire interest in a chattel, belonging to two joint owners or tenants in common, has been sold by the sheriff under execution against one of them, at a place not authorized by law, they cannot unite in an action on the sheriff's official bond against him and his sureties; the remedy of one being an action on the case, and that of the other trespass or trover.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by F. B. Sheppard and C. B. Hopkinson, against James T. Shelton, and the sureties on his official bond as sheriff of Mobile county; the complaint being in the following words: "The plaintiffs claim of the defendant one thousand dollars, for the breach of the condition of a bond made by the defendants on the 4th day of August, 1858, payable to the State of Alabama, with condition as follows," &c., (setting out the condition of the bond, in the usual form.) "And the plaintiffs say, that the condition of said bond has been broken by the defendants, in this: that the said Shelton, being sheriff of Mobile county, did, by virtue of an execution issued out of the city court of Mobile, on the 27th August, 1858, in the case of W. R. Smith v. F. B. Sheppard, and returnable to the December term of said court, levy near Mount Vernon in said county on a certain stock of cattle, consisting of twenty-five head, belonging to the plaintiffs; and that he (said Shelton) did remove said stock of cattle to Jack Neely's,—the same not being the residence of said F. B. Sheppard, nor any other place authorized by law for the sale of said property, and, on the 12th October, 1858, at said Jack Neely's, did sell said cattle; to plaintiffs' damage as above stated." The court sustained a demurrer to this complaint, and the plaintiffs then added the following words by way of amendment: "They say that said Shelton removed said stock of cattle, so levied on as aforesaid, to Jack Neely's, the same not being the residence of the plaintiffs, or either of them, nor the courthouse of the said county, nor the place where said property was levied on, nor the neighborhood thereof."

To the amended complaint the defendants filed a plea in these words: "Defendants aver, that said cattle were levied on in the woods, and were removed to Jack Neely's, and there sold, it being a place in the neighborhood where they were levied on, and the most convenient place thereto at which they could be sold for the best price." To this plea the plaintiffs demurred, on the two specified grounds—1st, "because it states a conclusion of law," and, 2d, "because it is not sufficient, in law, that the place where the property was sold should be the most



convenient place to the defendant's residence, where it would bring the best price." The court overruled the demurrer, and issue was then joined on the plea.

"On the trial," as the bill of exceptions states, after the plaintiffs had read in evidence the bond and execution described in the complaint, "they then proved that, under and by virtue of said execution, the cattle mentioned in the complaint were levied on by one John W. Moore, a deputy sheriff, at a place about two miles from Mount Vernon in said county; and that said Moore, when about to make the levy, was informed by Sheppard that said Hopkins was jointly interested with him in said cattle. The plaintiffs introduced evidence, also, tending to show their joint ownership of said cattle, and that they were in the possession of said Sheppard at the time of the levy. The evidence on the part of the plaintiffs further showed the following facts: That Sheppard resided about one mile from Mount Vernon; that said cattle, so levied on as above stated, were removed to the house of one Jack Neely, which was about five miles from the city of Mobile and the court-house of said county, and about twenty-five miles distant from the residence of said Sheppard, and from the place where the levy was made; and that said cattle were sold at said Neely's, on the 25th October, 1858, to the highest bidder, by the said Shelton as sheriff, under and by virtue of the said execution, as the sole and separate property of the said F. B. Sheppard. The evidence showed, also, that the cattle brought their full value at said sale, as much as they would have brought at public sale at the residence of said Sheppard, or at the place where they were levied on, or at the court-house of the county; and that the proceeds of said sale had been applied to the satisfaction of said execution in favor of Smith against Sheppard, and of another execution in favor of Mazange & Co. against said Sheppard.

"Upon this evidence, the court charged the jury, among other things, that if they believed the cattle belonged to Sheppard alone, or to Hopkinson alone, the defendants were entitled to a verdict; and that in reference to the point urged by the defendants—viz., that the

plaintiffs could not jointly recover under the evidence in this form of action—as it had only been made in the closing speech, and the plaintiffs insisted on their right to recover in the joint action, the cause would be left to them as it had been presented by the evidence and the arguments, particularly as that ground had not been assigned or referred to in the demurrer to the complaint.

“The court charged the jury, also, that if they believed the cattle belonged to the plaintiffs, and were levied on under the execution against Sheppard alone, and were sold under said execution by said Shelton, as sheriff, at a place not in the neighborhood of Sheppard’s residence, nor of the place where the levy was made, nor at the court-house of the county, as the sole property of Sheppard, then the plaintiffs were entitled to recover the full damage that had been sustained; that in determining this damage, they should take into consideration the amount of money (if any) paid by Shelton, from the proceeds of the said sale of the cattle, in satisfaction of the executions against Sheppard; and that if the property realized at the sale as much money as it would have brought at a place authorized by law, or more, and the entire proceeds of sale were applied to the satisfaction of executions against Sheppard individually, they could only find nominal damages in this action. To this charge the plaintiffs excepted.

“The court also charged the jury, at the request of the defendants, that though the cattle may have been the joint property of the plaintiffs, yet, in this suit, they cannot give the value of Hopkinson’s interest as damages. To this charge, also, the plaintiffs excepted.

“The plaintiffs requested the court to instruct the jury, ‘that if they believed the cattle sued for belonged to the plaintiffs in this suit jointly, and were levied on by Shelton, as sheriff, under an execution against F. B. Sheppard individually, and were sold by him at Jack Neely’s; and further, that Jack Neely’s was not in the neighborhood of the residence of either of the plaintiffs, nor of the place where the cattle were levied on; and that the cattle were sold as the property of F. B. Sheppard alone,—then the

defendants are liable to the plaintiffs, and the jury must render a verdict in their favor, for the market value of the cattle at the time of the levy.' This charge the court refused to give, and the plaintiffs excepted."

The errors now assigned are, the sustaining of the demurrer to the original complaint, the overruling of the demurrer to the plea, the charges given by the court to the jury, and the refusal of the charges asked.

H. F. DRUMMOND, for appellants.

E. S. DARGAN, *contra*.

R. W. WALKER, J.—The appellant can take nothing by showing that the court improperly sustained the defendant's demurrer to the original complaint. He waived his right to review that decision, by amending his complaint, and proceeding to trial upon it as amended.—*Stallings v. Newman*, 26 Ala. 300.

2. If it be admitted that the amended complaint stated a substantial cause of action, the plea interposed presented a full defense.—Code, § 2446.

3. In *Smyth v. Tankersley*, 20 Ala. 212, it was said by this court, that "the sale by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority which renders him liable as a trespasser *ab initio*."—See, also, *Waddell v. Cook*, 2 Hill, 49, note (a); *Melville v. Brown*, 15 Mass. 82. But all the cases, in which this principle has been applied, have been cases in which the suit against the officer was brought, not by all the tenants in common, but only by those who were not defendants in the execution, and whose property had been applied to the satisfaction of a judgment to which they were strangers. We have found no case, in which it has been decided that a sale by the sheriff of the entire property, under an execution against one of several tenants in common, would render him liable to an action by all the joint owners. It seems to us that the demands of justice are satisfied, and legal principles vindicated, by holding that a sheriff, who sells the entire property in a



chattel owned by two tenants in common, under an execution against one of them, is guilty of an abuse of legal authority, which renders him liable to the other joint owner, to the extent of the latter's interest in the property, as a trespasser *ab initio*. The sale works a severance of the interests, and the injured tenant in common may maintain a separate action against the officer; but such a sale constitutes no cause of action in behalf of the tenant in common who is the defendant in execution.—See Waddell v. Cook, 2 Hill, 49, note (a); Phillips v. Cook, 24 Wend. 397; Owings v. Trotter, 1 Bibb, 157; Jones v. Yates, 9 Barn. & Cress. 532; Ladd v. Hill, 4 Verm. 164; Drake on Attachments, § 248, and cases cited; Williams v. Hartshorn, 31 Ala. 155.

The facts of the present case illustrate the propriety of the rule as here stated. The execution was against one of two tenants in common, and the entire property was sold under it for its full value, and the proceeds applied in discharge of the execution. If the tenant in common whose debt has thus been satisfied by the proceeds of the sale, can now join his co-tenant in an action against the sheriff to recover damages of him for making the sale, it is obvious that the latter would have no right to reduce the demand by setting off the whole or any part of the amount so applied in satisfaction of the judgment against one of the joint owners; for that would be to set off a demand due by one of two plaintiffs, against a demand in favor of both of them. A proposition which would lead to a result so absurd and unjust, cannot receive our sanction. \*So far, therefore, as the act of selling the entire property constituted a cause of action at all, it was one which accrued to Hopkinson alone; and if that is the *gravamen* of the action, Sheppard was improperly joined as a plaintiff in the suit.

4. It is provided by section 2446 of the Code, that "lands, slaves, horses, mules, jacks and jennets, when levied on by execution from courts of record, must be sold on the first Monday in the month, at the court-house of the county; other property may be sold on any day except Sunday, either at the court-house, the resi-

dence of the defendant, the place where levied, or the neighborhood thereof, as may be most expedient." In reference to that part of the foregoing section which relates to the sale of "*other property*," it is obvious from the language employed that the sheriff is necessarily invested with some discretion in selecting the place of sale. If he sells property, of the class here designated as "*other property*," at a place not embraced by the terms of the statute, the most that could be said is, that he has been guilty of an irregularity in the discharge of his duty, which would make the sale voidable at the instance of a party to the process, or render the sheriff liable in an action on the case for any actual damages sustained by reason of such irregularity. We do not think that such a sale would constitute the sheriff a trespasser; and consequently the appropriate remedy of the injured party would be neither trespass nor trover, but an action on the case, the gist of which would be the irregular manner in which the sale had been conducted, and actual damage resulting therefrom. It is true, perhaps, that under the Code, the person injured by such irregularity would not be confined to an action on the case; for, by section 130, a recovery for the improper or neglectful performance by a sheriff of the duties imposed on him by law, may be obtained by an action on his official bond, against him and his sureties. *McElhany v. Gilleland*, 30 Ala. 183.

It does not appear that the plaintiff Sheppard has sustained any actual damage, in consequence of the sale having been made at an improper place. But, even if that were shown, it would not in the present case affect the result. For, on the supposition that he has been actually damaged, the cause of action in his favor is one which grows out of the fact that the sheriff improperly sold his property at a place not authorized by law, and that he was thereby injured. On the other hand, Hopkinson's right of action is one which arises out of the act of the sheriff, in selling his property under an execution against another. This right of his does not depend on, and is not affected by the place of sale. Apart from the provision made in section 130 of the Code, the only

remedy which Sheppard could have against the sheriff would be an action on the case; while, on the other hand, that action would not lie in favor of Hopkinson, who could recover in trespass or trover, but not in case. This being so, it is clear that they cannot join as co-plaintiffs in an action on the bond. Section 130 of the Code was not intended to confer upon persons the right to unite in an action upon the official bond of the sheriff, unless they have a common cause of action, upon which they could at common law have brought a joint action against that officer. We have shown that, if it be conceded that each of the plaintiffs has a cause of action, yet they are separate and distinct causes of action, for which, at common law, distinct and different suits would have to be resorted to. The result is, that there was a clear misjoinder of parties plaintiff, and if the court erred at all in its charges, it was in favor of the appellants; and they will not be heard to complain of errors which could not prejudice them.

Judgment affirmed.

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### WALKER vs. McCOY.

[ACTION ON COMMON MONEY COUNTS—PLEA OF SET-OFF.]

1. *What demand is available as set-off, or in recoupment of damages.*—In an action on the common money counts, to recover money which was taken from plaintiff's possession, when arrested on a charge of having carried off defendant's slave with intent to convert her to his own use, and which was handed to defendant by the agent who made the arrest, the expenses actually incurred by defendant in regaining his slave are not available as a set-off, (Code, § 2240,) nor in recoupment of damages.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by Pinckney L. McCoy,



against John H. Walker, to recover the sum of \$200, alleged to be due by account on the 1st August, 1857; on an account stated; for money had and received, and for money paid, laid out and expended. The defendant pleaded the general issue, and a special plea in the following words: "Defendant further pleads, in short by consent, that the said plaintiff, before the commencement of this suit, did feloniously take from defendant's possession a negro girl slave, named ———, the property of said defendant, and carried her out of the State of Alabama, with intent to convert her to his own use; that in consequence of said felonious act on the part of said plaintiff, said defendant necessarily incurred great expense in order to reclaim said slave, to-wit, the sum of \$400; that said defendant was compelled to pay said sum of \$400 by the said plaintiff's wrongful and felonious act; and that no part of said sum has ever been refunded to said defendant by said plaintiff, or by any one else for him, except the sum of \$126, which is the subject of this suit."

The following are the agreed facts of the case: "It is admitted, that the plaintiff, before the commencement of this suit, feloniously took from the defendant's possession a negro girl, named ———, the property of said defendant, and carried her beyond the limits of this State, with intent to convert her to his own use; that in order to reclaim said slave, said defendant incurred expenses to the amount of \$400, in the employment of agents and police officers in Alabama and Georgia; that he employed one McGibbony, a resident of Montgomery, to pursue and arrest said plaintiff, and to recapture said negro girl; that McGibbony pursued plaintiff to Atlanta, Georgia, and there procured his arrest and the recapture of the negro, and that defendant paid McGibbony \$400 for said services. It is further admitted, that said plaintiff, at the time he was arrested, had in his possession \$126; that McGibbony took possession of said money, and handed it over to the defendant's possession before this suit was brought, and it is now in his possession; and that McGibbony brought plaintiff and said negro girl back to Lowndes county, and delivered said negro to defendant. It is

admitted, also, that said defendant procured an indictment against said plaintiff, for stealing said negro; that plaintiff was tried under said indictment, condemned, and sentenced to the penitentiary, and that he is now confined in the penitentiary under the judgment of the circuit court of Lowndes."

On these facts, the court charged the jury, "that if they believed the evidence, they must find for the plaintiff;" to which charge the defendant excepted, and which he now assigns as error.

J. D. F. WILLIAMS, for the appellant.—1. Walker's demand did not sound in damages merely, but the amount thereof was clearly and accurately ascertained to amount to \$400.—Holley v. Younge, 27 Ala. 203; Gibson v. Marquis, 29 Ala. 668.

2. Walker could have maintained an action on the case against McCoy, or trespass *vi et armis*, for enticing away or harboring his slave.—1 Chitty's Pl. 134; Ditcham v. Bond, 2 Maule & Sel. 436.

3. In an action for enticing away a servant, the plaintiff may recover, not only the necessary expenses incurred in reclaiming his servant, but for the loss of service, provided he proves the value of the lost services.—Sedgwick on Damages, 445; Hays v. Borders, 1 Gilman, 46, 65. But in this case, he only claimed the amount of money actually paid out, and adduced no proof of the value of the services. If he had sued Wiley, he could have either declared for the amount actually paid out, or claimed vindictive damages besides; and he may avail himself of the same right under the plea of set-off, claiming only the actual expenses.

BAINES & NESMITH, *contra*.—Wherever the defendant, if he were suing, could recover vindictive damages, his demand sounds in damages merely, and, consequently, is not available as a set-off under the statute.—Pearce v. Hoffman, 4 Wis. 277; Patterson v. Richards, 22 Barbour, 143; Holley v. Younge, 27 Ala. 206; Parker v. Mise, 27 Ala. 483.

2. The doctrine of recoupment only applies where both demands spring out of the same contract or transaction. *Hatchett & Bro. v. Gibson*, 13 Ala. 587.

A. J. WALKER, C. J.—The defendant's cause of action against the plaintiff was recoverable only in an action of trespass *de bonis asportatis*. The law does not prescribe or fix any measure of damages in that action. The plaintiff's demand was, therefore, one "sounding in damages merely." For his cause of action he had a right to demand, not only such special damages as he might prove, but also such vindictive damages as the jury might find. The defendant's demand was, therefore, precisely such as is excluded from the statute of set-off by the decisions in *Holley v. Younge*, 27 Ala. 303; and *Gibson v. Marquis*, 29 Ala. 668.

The argument for the defendant is, that his demand consisted, in part, of a right to recover the actual expenses incurred in regaining his property, when it was taken and carried away by the plaintiff; and that that part of his demand was susceptible of a definite ascertainment, by an application of the rules of the law, and that it may be set off without an infringement of the statute. If this be a sound argument, the special damages in an action of slander, malicious prosecution, false imprisonment, seduction, or assault and battery, might be brought forward under a plea of set-off. This would be productive of great inconvenience and confusion, and there is certainly no warrant for it in the statute. The right of set-off must always be mutual.—*Taylor v. Bass*, 5 Ala. 110; Code, § 2240. If the defendant may set off his demand against the plaintiff's, then the plaintiff would have the like right of set-off, if the attitude of the parties in the suit were reversed. This rule would be violated, by allowing the defendant in this case to abandon all except his special damages, and claim then under a plea of set-off. If the defendant in this suit were the plaintiff, suing in trespass *de bonis asportatis*, the present plaintiff would have no right to set off the demand now in suit. He could not say, I will split up your demand, and bring



forward my set-off against so much of it as is for special damage. Such a course could not be allowed, without a plain violation of the statute, which excludes the right of set-off where the demand sounds in damages merely. Thus, the result of the position taken for the defendant would be, to make his demand within or without the law of set-off, at his election.

The doctrine of recoupment is not available to the defendant, because the demands of the parties spring out of different transactions.—Hatchett v. Gibson, 13 Ala. 587.

Judgment affirmed.

### KELLY'S HEIRS vs. ALLEN.

[BILL IN EQUITY BY PURCHASER FOR COMPENSATION AND INJUNCTION OF ACTION  
AT LAW ON NOTES FOR PURCHASE-MONEY.]

1. *Mode of computing damages to purchaser on account of misrepresentation of boundary lines.*—In computing the damages to which a purchaser is entitled, by way of compensation, or abatement of the purchase-money, on account of his vendor's falsely representing certain adjacent lands as included within the boundaries of the tract sold, the correct rule is to ascertain the average value, per acre, of the tract actually sold and conveyed, and what would have been its average value if it had included such adjacent lands; the difference between the two amounts being the measure of damages to which the purchaser is entitled.
2. *When purchaser may come into equity, to obtain compensation, or abatement of purchase-money.*—A purchaser's remedy, on account of his vendor's misrepresentations respecting the boundaries of the land, being adequate and complete at law, either by an action for damages before the Code, or by plea of set-off under the Code to an action on the notes given for the purchase-money, he cannot, in the absence of some special equity, maintain a bill in chancery for compensation, or an abatement of the purchase-money but the removal of the vendor from this State, and his subsequent death in a foreign State, where his estate has since been settled up and distributed, afford a special ground for equitable relief, in a case not governed by the Code.
3. *When misrepresentation constitutes fraud; variance.*—A false representation of a material fact by the vendor, though not known by him at the time to

be false, may constitute a fraud on the purchaser; consequently, it is not a material variance, that the vendor's misrepresentation is not proved, though alleged, to have been intentionally false.

4. *Averments of purchaser's bill for compensation.*—When a purchaser files a bill in equity for compensation, or an abatement of the purchase-money, on account of his vendor's misrepresentations respecting the boundaries of the tract, he must allege, either that the quantity of land conveyed to him was less than he contracted for, or that the land falsely represented to be included within the boundaries of the tract was of greater value than the residue, or possessed some peculiar advantages.
5. *Remandment on reversal.*—When a material defect in the bill, to which the attention of the chancellor was not called, is noticed for the first time in the appellate court, on errors assigned by the defendant, the cause will be remanded.
6. *Estoppel en pais against making defense to note.*—If the maker of a note, given for the purchase-money of land, substitutes a new note in its stead, without any new consideration, to a mere voluntary assignee of the vendor, this does not estop him from defending against the new note on account of his vendor's misrepresentations as to the boundaries of the land.
7. *Laches in making defense to note.*—The doctrine of laches, as applied in equity to bills for the enforcement of stale demands, is not applicable to a case in which a party seeks to establish a defense, by way of equitable set-off, against an action at law on a note given for the purchase-money of land.

APPEAL from the Chancery Court of St. Clair.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 3d March, 1848, by Russell J. Allen, against Andrew J. Crawford, Russell J. Kelly, John D. Fennell, and others, distributees of the estate of George A. Kelly, deceased. Its principal object was to obtain compensation, or an abatement of the purchase-money, agreed to be paid by complainant for a tract of land purchased from said George A. Kelly, on account of alleged misrepresentations respecting the boundaries of the land; also, to enjoin a judgment and pending action at law on notes given for the purchase-money; and the general prayer, for other and further relief, was added. The contract for the sale of the land was made in October, 1839. The alleged fraud consisted of misrepresentations by said Fennell, who acted as the agent of Kelly in making the contract, as to the eastern boundary of the land; he pointing out, as within its limits, about sixty-five acres of rich land which in fact lay outside the eastern boundary. Fennell executed his bond for title, as agent

of Kelly, conditioned to make a good title to the land on the payment of the purchase-money; and Allen entered into possession under the contract. Three notes were given for the purchase-money, each for the sum of \$1,776, payable on the 15th January, 1840, 1841, and 1842, respectively. Two of these notes were paid, at or soon after maturity. In the meantime, Kelly removed to Mississippi, and there died, some time during the year 1844; bequeathing the unpaid note, by his last will and testament, to said Russell J. Kelly, Andrew J. Crawford, and John D. Fennell. In July, 1845, this last note was taken up by Allen, who executed to said Kelly, Crawford and Fennell, in lieu of it, his three notes for \$709 each, one payable to Kelly, another to Crawford, and the third to one Coleman, who had purchased Fennell's interest. The estate of George A. Kelly was finally settled and distributed in Mississippi, before the commencement of this suit, but no administration was ever had in Alabama. The complainant alleged, that he had discovered the fraud practiced on him within one year before the filing of his bill; that he then insisted on a reduction of the amount due on the note held by Crawford, which the latter refused to allow; that Kelly had obtained a judgment on his note, and Crawford had instituted an action on the note held by him.

Separate answers were filed by the three principal defendants, admitting all the material allegations of the bill, except as to the alleged fraud, which they all denied; and Kelly and Crawford each demurred to the bill for want of equity.

A motion to dismiss the bill, for want of equity, was made before Chancellor LIGON, and overruled by him. On final hearing, on pleadings and proof, Chancellor CLARK rendered a decree for the complainant, and ordered a reference to the master to ascertain the amount of compensation. His directions to the master, in taking the account, were as follows: "It is therefore ordered, that it be referred to the register of this court to inquire and ascertain the quantity of land lying east of the lands embraced in the title-bond mentioned in the pleadings, which



were represented by John D. Fennell to be within the boundaries of the land embraced in said title-bond, but which in fact were not; and when he has ascertained the quantity of said lands on the east, he will then inquire and ascertain what would have been the value of said lands, per acre, at the time of the sale of the other lands to complainant, on the terms stated in the title-bond, and considering said lands as embraced in the sale; and when he has thus ascertained the quantity of said lands on the east, and the price, he will then ascertain what would be the value of a corresponding quantity of the land included in the title-bond lying on the west boundary, at the time of said purchase, and on like time and credit, provided the same formed a part of the adjacent lands not belonging to the tract sold; and then he will deduct the same from the allowance for the land beyond the east boundary, so valued by him, and divide the balance into three equal sums, computing interest on one-third from the 15th January, 1840," &c. The master's report, under this order of reference, was heard before Chancellor FOSTER, and by him confirmed.

The errors now assigned are, the overruling of the demurrer to the bill, the rendition of a decree on the merits for the complainant, the instructions to the master in stating the account, and the final decree confirming the master's report.

B. T. POPE, for appellants, made the following points:

1. The bill ought to have been dismissed for want of equity, because the complainant had an adequate remedy at law.—*Wilson v. Jordan*, 3 Stew. & P. 92; *Lewis v. Bibb*, 4 Porter, 88; 9 Porter, 434; 6 Ala. 785.

2. The bill does not make out a case for compensation, because it does not aver that the complainant got less land in quantity than he contracted for, nor that the lands outside of his boundaries, which he asserts were represented to be within the boundaries of the tract, possess any greater value than the other lands.

3. The bill shows on its face that the complainant did not act with that promptness and decision which is

required of parties who seek relief in equity. He admits that, within a year after his purchase, he ascertained that there was "some error," which he would have corrected by a survey. Having notice sufficient to put him on inquiry, he neglects to have the lines run by a surveyor, afterwards gives new notes, frequently promises to pay them, and waits more than eight years before filing his bill.—Griggs v. Woodruff, 14 Ala. 15.

4. The evidence fails to establish any fraud or misrepresentation on the part of the vendor or his agent.

5. The instructions to the register, as to the manner of stating the account, were erroneous.—Stow v. Bozeman, 29 Ala. 397.

JAMES B. MARTIN, *contra*, submitted the case on the chancellor's opinion.

STONE, J.—In giving directions to the register, as to the mode of ascertaining the complainant's damages in this case, the chancellor erred. The correct rule is laid down in Stow v. Bozeman, 29 Ala. 397, and Williams v. Mitchell, 30 Ala. 299.

2. It is contended for appellant, that the complainant's bill should have been dismissed—1st, because he had an adequate remedy at law; and, 2d, because he fails to establish by credible testimony any material misrepresentation by Fennell of the boundaries of the land.

The various questions growing out of contests between vendors and vendees of land, have probably furnished material for as much litigation in this State as any other class of contracts. Like most other subjects which have been often before this court, it is somewhat difficult to reconcile all that has been said in the several cases. This renders it unsafe to affirm, with certainty, any absolute rule, which shall, in all cases, inform the practitioner when his defense is at law, and when he may resort to equity. We do not propose to remove any difficulties, save those which seem to be called for by the present record.

The present bill charges, that Fennell, the agent of Kelly, in negotiating the sale to complainant, misrepre-

sented the eastern boundary of the tract, pointing out as within the numbers he was selling a body of rich bottom land; that he, the vendor, knew where the true line ran; and that the complainant was ignorant of the lines, a stranger in the neighborhood, and trusted in Fennell's representations.

The complainant, at the time he commenced the present suit, had a clear right to maintain an action at law against his vendor, for the damages he complains of. *Munroe v. Pritchett*, 16 Ala. 785; *Gibson v. Marquis*, 29 Ala. 668; *Gordon v. Phillips*, 13 Ala. 565; *Morgan v. Patrick*, 7 Ala. 185. On the facts disclosed in this case, the vendor could not, at the time he filed this bill, defend, on the ground stated, against a suit for the purchase-money.—*Patton v. England*, 15 Ala. 69; *Dunn v. White*, 1 Ala. 645; *Calloway v. McElroy*, 3 Ala. 406; *Elliott v. Boaz*, 9 Ala. 772; *Horner v. Purser*, 20 Ala. 573; see, also, *Newell v. Turner*, 9 Por. 420. He could, under the Code, make such defense.—*Holley v. Younge*, 27 Ala. 203; *Marquis v. Gibson*, 29 Ala. 668.

Having at the time an adequate remedy at law to sue and recover damages, and having, under the decisions of this court, no right to make his defense at law when sued for the purchase-money, did this confer on him the right, in a case in which no rescission was sought, to file a bill in chancery, obtain an injunction, and, in this way, recover compensation in damages for the fraud or misrepresentation? Can a bill be maintained for compensation, as an independent ground of relief, when the damages complained of are susceptible of certain ascertainment, or will such relief be granted in chancery only as an incident to some other relief of equitable cognizance?

In *Aday v. Echols*, 18 Ala. 353, a bill was filed for specific performance of an oral contract for the purchase of land, and failing in that, was retained as a suit for compensation. The principle declared is sustained by many decisions, a leading one of which is *Denton v. Stewart*, 1 Cox, 258; see, also, *Greenaway v. Adams*, 12 Vesey, 395; *City of London v. Nash*, 3 Atk. 512, 517; *Cud v. Rutter*, 1 Pr. Wms. 570; *Phillips v. Thompson*, 1 Johns.



Ch. 131, 150; Pratt v. Law, 9 Cranch, 456; Woodcock v. Bennett, 1 Cow. 711; Hollis v. Edwards, 1 Vern. 159.

The principle, perhaps, rests on an extension, of doubtful propriety, of the doctrine of *cy pres*. It has been assailed in many able and well considered opinions. We do not pronounce on it now, as this case rests on a different principle.—See the following authorities: Jenkins v. Parkman, 1 Cooper's Sel. Cases, 179, 8 Eng. Ch. 430; Clinan v. Cooke, 1 Sch. & Lef. 22, 25; Guillim v. Stone, 14 Vesey, 129; Todd v. Gee, 17 Ver. 274; Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 193; Sims v. McEwen, 27 Ala. 184, 192; 2 Story's Eq. § 778, and note.

It is manifest to us that, as a mere defense, in the absence of a special equity, the bill in this case should not be maintained.—See Harris v. Deramus, 33 Ala. 463; McLemore v. Mabson, 20 Ala. 137; Magee v. McMillan, 30 Ala. 420; Long v. Brown, 4 Ala. 622.

We are aware that two cases have been before this court, in which relief in the shape of compensation was decreed, on bills filed solely for that purpose.—See Stow v. Bozeman, 29 Ala. 397, and Wright v. Wright, in manuscript. In each of those cases, the appeal was prosecuted by the complainant; and no question was, or could be raised on the equity of the bills. Although they were probably not distinguishable from the present one, even if we regard this as a bill solely for compensation, without special equities; still we do not regard them as committing us to the proposition, that those bills were well filed.

We need scarcely add, that there are many cases, in which there exist special equities, which justify a resort to chancery. The following are instances:

1st. When the vendor makes false or fraudulent representations as to a matter material to the boundary or title, and the vendee on that account seeks a rescission.—Harris v. Carter, 3 Stew. 233; Pitts v. Cottingham, 9 Porter, 675; Young v. Harris, 2 Ala. 108; Clemens v. Loggins, 2 Ala. 514; Camp v. Camp, 2 Ala. 632; Spence v. Duren, 3 Ala. 251; Duncan v. Jeter, 6 Ala. 604; Elliott v. Boaz, 9 Ala. 772; Griggs v. Woodruff, 14 Ala. 9; Patton v.

England, 15 Ala. 69; Parks v. Brooks, 16 Ala. 529; Read v. Walker, 18 Ala. 323; Smith v. Robertson, 23 Ala. 312; Bonham v. Walton, 24 Ala. 514; Lanier v. Hill, 25 Ala. 554; Foster v. Gressett, 29 Ala. 393; Bailey v. Jordan, 32 Ala. 50.

2d. When the defense relied on is a defect in, or incumbrance upon the title, and the vendor is insolvent, or unable to respond in damages; or, if the incumbrance be of such a character that it does not admit of reduction to a money value, chancery will interfere, and indemnify the purchaser, by arresting, *pro tanto*, the collection of the purchase-money. Christian v. Scott, 1 Stew. 490; Smith v. Pettus, 1 S. & P. 107; Wilson v. Jordan, 3 St. & P. 92; Wiley v. White, 3 St. & P. 355; Larkins v. Bank of Montgomery, 9 Por. 439; Stone v. Gover, 1 Ala. 287; Clemens v. Loggins, 1 Ala. 622; Dunn v. White, 1 Ala. 645; Bliss v. Smith, 1 Ala. 273; Giles v. Williams, 3 Ala. 316; Clay v. Dennis, 3 Ala. 375; Cullum v. Bank, 4 Ala. 21; Starke v. Hill, 6 Ala. 785; Bates v. Terrell, 7 Ala. 129; Tankersley v. Graham, 8 Ala. 247; Bird v. Daniel, 9 Ala. 302; Knight v. Turner, 11 Ala. 636; Hunter v. O'Neal, 12 Ala. 37; Greenlee v. Gaines, 13 Ala. 198; Parks v. Brooks, 16 Ala. 529; Springle v. Shields, 17 Ala. 296; Read v. Walker, 18 Ala. 323; McLemore v. Mabson, 20 Ala. 137; Thrasher v. Pinckard, 23 Ala. 616; Wray v. Furniss, 27 Ala. 471.

3d. There are, also, other special equities, which will uphold such bill; and acquiring jurisdiction for one purpose, the court of chancery will go on and do complete justice between the parties.—Williams v. Mitchell, 30 Ala. 299; Stewart v. Stewart, 31 Ala. 207.

We think, however, that this bill does present a special equity, which will uphold the jurisdiction of the chancery court. Mr. Kelly, the vendor, had removed from the State, and had died; and his estate was settled up and distributed in the State of his last residence. The complainant in this bill could not defend at law, as was then well settled by several decisions of this court. This, we think, justified a resort to the process of injunction, which

the chancery court alone can make available.—See *Williams v. Mitchell, supra*.

[3.] We have carefully looked into the testimony in this case, and think it satisfactorily proves the misrepresentation of boundary charged in the bill. On this point, we think the chancellor was fully justified in decreeing relief to complainant. We are not able to perceive the conflict between the averments of the bill and the testimony of the two Allens, which is asserted. The bill charges, on *information and belief*, that Fennell knew the lines; not that he *professed* to know them. The witnesses do not testify that Fennell *knew* the lines—they could not probably know that. Their evidence is, that he *professed* to know the lines. The charge is of a fact not generally susceptible of direct proof. The testimony was doubtless offered, as tending to prove that fact. The fact, however, was immaterial.—See *Munroe v. Pritchett, supra*; *Lanier v. Hill, supra*; *Atwood v. Wright*, 29 Ala. 346.

[4.] In one aspect, this bill must be pronounced defective. It will be seen that it does not seek a rescission of the contract, but only compensation in damages. True, it was originally filed with an alternative prayer; but on the hearing, the complainant waived his prayer for rescission, and all right to that form of relief. The averments of the bill are, that some sixty-four acres of valuable bottom land were falsely pointed out to complainant as being within the tract; that those sixty-four acres were worth \$500, and that they operated as an inducement, without which complainant would not have made the purchase. There is no deficiency in quantity alleged or proved; nor is there any averment, or intimation, that the alleged sixty-four acres possessed any peculiar value above the balance of the tract. For aught that appears in the pleadings, the average value of the land actually obtained under the purchase is as great, and may be greater, than it would be if its lines so ran as to embrace the sixty-four acres. If we were to grant compensation under a bill framed as this is, the result might be, that a purchaser who obtained, in quantity, all he contracted for, and in fertility and value more than had been repre-



sented, would, in addition, be allowed to recover the value of the land, outside of the tract, which may have been ignorantly, though erroneously, pointed out. This would be in palpable violation of the measure of damages in such cases, which gives to the purchaser only what he has lost, in obtaining lands less valuable than they would have been if the lands pointed out constituted a part of them. In the present case, Mr. Allen might obtain the land he bargained for, in kind and quantity, and the value of an additional sixty-four acres, as compensation in damages.

[5.] As this defect does not seem to have been brought to the notice of the court below, we will not make it the basis of a final disposition, but will remand the cause.

[6-7.] It is objected to the relief sought by this bill, that Mr. Allen, after he had received sufficient notice to put him on inquiry as to the misrepresentation, entered into new stipulations; and that this, together with the length of time he permitted to elapse, should preclude him from making the defense against the purchase-money which he sets up. To the note held by Mr. Coleman, the bill concedes that no defense can be made.

The giving of the new notes, and the promises made to pay them, being without any new consideration, do not estop the complainant from making defense.—*Finn v. Barclay*, 15 Ala. 626; *Ware v. Cowles*, 24 Ala. 446; *Carroll v. Malone*, 28 Ala. 521.

If this were an independent suit for relief, the question of *laches* would demand a much more serious consideration, than it does in its present form. This suit, however, is defensive. It seeks to recover nothing, but simply to reduce the recovery of the plaintiff in the suits at law. It concedes a liability, but controverts the extent of it. Being defensive, we can not apply to this case the doctrine of staleness. As well might it be urged, that a defense which rested on fraud, or failure of consideration, in the sale of a chattel, was lost by a failure to rely upon it, until a suit for the purchase-money rendered its assertion necessary.

In aid of this view, it is proper to say that, as we under-

stand the record, the period which elapsed between the time when Mr. Allen might have discovered the extent of injury he had sustained, and the time when his special equity accrued—namely, when his remedy at law became inadequate—must have been, if such laches have any application to defenses, much less than six years.

The decree of the chancellor is reversed, and the cause remanded.

A. J. WALKER, C. J., not sitting.

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JOHNSON vs. FLINT.

[ACTION ON APPEAL BOND AGAINST SURETIES.]

1. *Discharge of sureties on appeal bond by agreement between parties to appeal.*—An agreement between the parties to an appeal pending in the supreme court, entered into without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified amount, at the costs of the appellant, and that the property in controversy should belong to him, discharges the sureties from liability on their bond.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by P. D. Flint, against Francis M. Johnson and David Stodder, and was founded on an appeal bond, which was executed by the defendants as the sureties of one Robert S. Kirk, and conditioned as follows: "Whereas the above bound Robert S. Kirk has applied for and obtained an appeal, returnable to the January term, 1857, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said P. D. Flint against him, at the May term, 1856, of the city court of Mobile, for \$3,710 19, besides costs; now, if the said Kirk shall prosecute to effect his said suit in the supreme court, and shall pay and satisfy such judgment

as the supreme court shall render in the premises, then this obligation to be null and void," &c. The breach alleged in the complaint was in these words: "That said suit being brought before the supreme court of Alabama, in pursuance of the condition of said bond, said court, at its June term, 1857, rendered judgment against said Kirk, for the sum of \$3,332 19, which said judgment the said Kirk has wholly refused to pay and satisfy; whereby the defendants became liable to pay said plaintiff the amount of said judgment of said supreme court, which they have wholly failed to pay and satisfy; to plaintiff's damage as aforesaid."

The defendants filed two special pleas, which were in the following words:

"2. For further plea in this behalf, the defendants say that, after said cause recited in said bond had been appealed, as therein stated, and was pending in the supreme court, and before the hearing thereof, the said P. D. Flint, plaintiff, and said R. S. Kirk, the principal in said bond, at Montgomery, to-wit, on the 6th June, 1857, made and entered into a contract and agreement, of which the following is a copy:

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| <p>'R. S. Kirk<br/>vs.<br/>P. D. Flint.</p> | } | <p>It is agreed in this case, that judgment be affirmed on the following terms: Four hundred dollars shall be deducted from the verdict, and the judgment shall be affirmed for <i>twenty</i> (?) three hundred and thirty-two 19-100 dollars, with interest thereon from the time of its rendition, that is, the rendition of the verdict; no other damages, however, to be allowed. It is further agreed, that the saw and grist-mill, boilers, machinery, &amp;c., be the property of Kirk, the defendant, and that Flint will deliver them to him, when called for, at the mills where they are; the affirmance to be at the cost of Kirk; and if the mills should be burned up, after this time, without the default of Flint, the loss shall be Kirk's.'</p> |
|---|---|--|

"And the defendants further say, that at the instance of said Kirk and Flint, and without argument or consideration, the said supreme court entered judgment on said contract as follows," &c., (setting out the judgment;)



“and that no other judgment or consideration of said cause was had in said appeal case, but the same was determined as aforesaid. Now these defendants say, that they were only the sureties of said Kirk on said bond; that said agreement, with the proceedings thereon in said court, was in the absence of these defendants, and without their knowledge or consent; wherefore they say that said appeal was not prosecuted according to law and the terms of said bond, by reason of the interference of said plaintiff, and the contract aforesaid with their principal, without their assent, and they are discharged.

“3. And said defendants, for further plea in this behalf, answer and say, that they executed said bond, with the condition aforesaid, as sureties for said Robert S. Kirk, and not in any manner otherwise; that the same was executed by them in the belief and confidence that said judgment, sought to be reversed, was erroneous, and that there was manifest error in the record and proceedings thereof, and that said cause was to be submitted for the consideration and judgment of said supreme court on the questions of law therein involved, according to the law and practice of said court,—which was, that if it appeared to said court that there was error therein, the said judgment should be reversed, and these defendants discharged from the obligation of said bond; and if affirmed, that the said court should render judgment of affirmance against said Kirk, and also against these defendants, with ten per cent. damages, costs and interest. And defendants further say, that after said appeal, the said hearing before the said supreme court was waived by an agreement between said plaintiff and Kirk, and it was agreed, by an agreement entered of record, that a certain special judgment should be rendered by the court, without hearing the questions of law involved; that in pursuance of said agreement, a judgment was rendered by said court, at its June term, 1857, by the special consent of said Flint and Kirk, that four hundred dollars be deducted from the verdict, and that the judgment of said city court be affirmed for thirty-three hundred and thirty-two 19-100 dollars, with interest thereon from the time of the rendi-

tion of the verdict, and that no other damages be allowed ; and further, that the saw and grist-mill, boilers, machinery, &c., described in the complaint, be the property of said Kirk ; and that said Flint deliver them to him, when called for, at the mill where they were, and that said Kirk pay the costs of the supreme court. And defendants further say, that said judgment of said supreme court was certified to said city court ; but that said supreme court did not render any judgment of affirmance as to said sureties, nor for any damages, but rendered judgment as if said judgment had not been superseded, and as in cases of reversal so far as the said sureties are concerned ; and they say that said judgment was so agreed to be rendered by said parties, and not in any other manner whatever, and that there was no agreement that said judgment should be affirmed as to said sureties, nor that they should be in any manner subjected to debt, damages, or costs ; but said judgment was against said Kirk alone, and so agreed to be rendered, and not otherwise. And defendants say that, by reason of said agreement, said appeal was not tried and determined according to the terms of their obligation, and as provided by law ; and that such waiver of trial was by consent of said plaintiff, and without the consent of said defendants ; and that therefore the condition of said bond is not broken, and they are not liable to the penalty of said bond, nor any part thereof ; all which they are ready to verify," &c.

The court below sustained a demurrer to each of these pleas, and its ruling is now assigned as error.

E. S. DARGAN, GEO. N. STEWART, and JNO. T. TAYLOR, for the appellants, contended that the sureties on the appeal bond were discharged by the agreement set up in the second and third pleas, and cited the following authorities: *Burge on Suretyship*, 117, 118, 214, 215, 217, 166; *Theobald on Principal and Surety*, 119, 130, 158, 184; *McKay & McDonald v. Dodge & McKay*, 5 Ala. 388, and cases there cited; *Archer v. Hale*, 4 Bing. 464; *Whitcher v. Hall*, 5 Barn. & Cress. 269; *Samuel v. Howatt*, 3 Mer. 277; *Bacon v. Chesney*, 1 Starkie, 182; *Eyre*

v. Bartrop, 3 Mad. 221; Barker v. Parker, 1 Durn. & E. 287; Boulton v. Stubbbs, 18 Vesey, 19; Bonner v. McDonald, 1 Law & Eq. R. 1; Miller v. Stewart, 9 Wheaton, 680; United States v. Tillotson, Paine's C. C. 305; Miller v. Stewart, 4 Wash. C. C. 26; Rathbone v. Warren, 10 Johns. 597.

ANDERSON & BOYLES, with R. H. SMITH, *contra*.—It is the judgment against the principal which fixes the liability of the sureties, and is, in fact, the evidence of their liability; the condition of the bond being, that Kirk should prosecute his appeal to effect, and pay and satisfy such judgment as the supreme court should render. Garey v. Frost & Dickinson, 5 Ala. 638; *ib.* 663; 3 Ired. L. 91; 1 La. Ann. 122; 4 Munford, 326; 1 Murph. 408; 3 J. J. Mar. 375. The liability of the surety is accessorial to that of the principal. If the principal has a defense, but waives it, the surety cannot take advantage of it. 9 Ala. 46; 16 Ala. 640. A valid judgment was rendered against the principal. The fact that the sureties were not parties to it, while it may prevent the plaintiff from suing out execution against them, does not affect their liability on the bond. The terms of the bond are sufficiently comprehensive to include whatever judgment the supreme court might render, whether by agreement, upon confession of errors, or on argument. If the court, of its own motion, had rendered judgment for less than the amount of the superseded judgment, the sureties would not have been thereby discharged; and the fact that their principal consented to the rendition of such judgment, cannot affect their liability. The question is, whether the agreement enlarged, extended, or materially changed the liability of the sureties; if it did not, they are not discharged.

R. W. WALKER, J.—The appellants were the sureties of Kirk on an appeal bond, the condition of which was, that Kirk shall “prosecute to effect his suit in the supreme court, and pay and satisfy such judgment as the supreme court shall render in the premises.” The obligation of



the appellants was for the performance of certain acts by a third person. In reference to obligations of this description, it is a well settled principle, that if the non-performance of the stipulated acts was occasioned by the conduct of the creditor, or was the result of an agreement between him and the principal obligor, the sureties are discharged.

This plain principle is conclusive of this case. The principal obligor was prevented from proceeding in the attempt to prosecute his suit to effect, by the agreement entered into between him and the obligee, without the knowledge or consent of the sureties. By thus interfering, and becoming a party to an agreement binding Kirk not to prosecute his appeal, Flint must be held to have waived the obligations in his favor imposed on the sureties by the terms of their bond.

The sureties guarantied the performance by their principal of a particular contract, and engaged for nothing more. Without their consent, and by an agreement between the creditor and their principal, in which mutual advantages are secured to each other, the contract into which the sureties entered has been varied. Now, nothing is more clear than that the surety will be discharged, at common law, in all cases where his responsibility is merely for the fulfillment by another of a contract which has been varied, without the consent of the surety, before a breach has occurred. In such case, the new or substituted obligation is not that which the surety undertook should be performed; and the party who seeks to make him liable for the breach of the original agreement, has, by his own act, prevented, or, at least, waived its performance, by binding the principal obligor to do something else, in the place of that for which the surety stipulated. 2 Am. Lead. Cas. 284; *Watriss v. Pierce*, 32 N. H. 560; *Woodcock v. Oxford Co.*, 21 Eng. L. & Eq. 289; *Sasseer v. Young*, 6 G. & J. 243; *McKay & McDonald v. Dodge & McKay*, 5 Ala. 388.

In the *Trustees of Section 16 v. Miller*, 3 Ohio, 261, the obligation of the defendant was for the performance by a tenant of certain stipulations in his lease during the continuance of the term; and the defense was, that the

plaintiffs had entered upon and dispossessed the tenant for a breach of condition, before the period at which the stipulations in question were to have been fulfilled. The court held, that as by the terms of the contract, which was to be performed on the land, the tenant had the whole term for its fulfillment, and, by the entry of the plaintiffs, performance had been rendered impossible, they were not entitled to recover for the breach. In the course of the opinion, the court thus stated the principle which controls this case: "If he who is to be benefited by the performance of a contract, is the cause why it is not performed, the contract is dissolved, and the party bound is discharged from his obligation, and will be in the same situation as if he had performed it."

In *Bowmaker v. Moore*, 3 Price, 214, an injunction was granted, to restrain a landlord from proceeding at law against the sureties of the tenant on a replevin bond, because there had been (without the consent of the sureties) an agreement between the landlord and tenant to refer the matters in difference, whereby the performance of the condition of the bond (to proceed with effect) had been suspended. In that case the court said: "This question lies in a narrow compass. The bond was, of course, conditioned that the principal should prosecute his writ with effect against the landlord. The action of replevin is in fact entered; but afterwards an agreement was entered into between the landlord and the tenant, without the concurrence of the surety, whereby the tenant is precluded from proceeding according to the condition. By that agreement, a mode is chalked out for ascertaining and arranging their mutual demands, and in the meantime all proceedings are to be stayed; so that the tenant is restrained, by the act of the landlord, from doing that which his surety engaged he shall do. It turns out, indeed, that the same parties afterwards agreed that the action shall proceed, so as to give the landlord his original remedy against the surety; but that is what we cannot suffer after what has been done. When the agreement of reference was executed, the bond, as against the surety, was *functus officio*."

In the present case, before any breach had taken place in the condition of the bond, the creditor and the principal, without the consent of the sureties of the latter, entered into a new agreement, founded upon a sufficient consideration, by which they stipulate for mutual advantages to each other. The benefit secured to Kirk by this agreement was, that a certain mill and machinery were to be his property; while, on the other hand, he was by it precluded from making any effort to perform the act for which his sureties had become bound—namely, the prosecution of his suit in the supreme court to effect. No matter how numerous the errors disclosed by the record in that case, this new agreement effectually prevented their correction by this court.

If there had been nothing beyond simple non-action on the part of Kirk—a mere waiver of his rights, or a failure to assign or insist upon errors—the sureties would be without defense. But the judgment which he has failed to satisfy was not the result of his simple failure to prosecute his suit, or of his waiver of his rights in the appeal; but was, on the contrary, the direct consequence of a valid agreement, which would have been broken if he had made any attempt to prosecute his appeal to effect. This is the substantial distinction between this case and all of those cited by the counsel for the appellee.

Judgment reversed, and cause remanded.

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### WILLINGHAM vs. HARRELL.

#### [MOTION TO DISMISS APPEAL.]

1. *To what term appeal is returnable.*—An appeal should be taken to the first ensuing term of the supreme court, (Code, § § 3018, 3022, 3030,) although the intervening period may be less than ten days; and if taken to the second ensuing term, it will be dismissed on motion.



APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

GEO. W. GAYLE, and D. W. BAINE, for appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—The appeal in this case was taken on the 28th day of December, 1858, six days before the commencement of the January term, 1859, and was made returnable to the June term, 1859. A motion is made to dismiss it, upon the ground that an appeal must be taken to the next ensuing term, notwithstanding there may be an intervening period of less than ten days.

Section 3018 of the Code makes it the duty of the register, clerk of the circuit court, or judge of probate, upon the taking of an appeal, to issue a citation, returnable to the *next* term of the supreme court. Section 3022 requires the delivery, upon application, of a transcript to the appellant, "in time to be returned to the *next* term of the supreme court." These two sections impose duties upon the officer granting an appeal, consistent only with the supposition, that the appeal should be taken to the next succeeding term of the supreme court; and there is, therefore, a clear manifestation of a design that it should be so taken.

It is also a requisition of section 3018, that the citation to the appellee should be served ten days before the court to which the appeal is taken. This does not modify the construction of the other parts of the law, which contemplate the return of the appeal to the next term. The service of the citation is not indispensable to the jurisdiction over the appeal, but is provided for the benefit of the appellee, and may be waived. It was said in *Cooper v. Maclin's Heirs*, 25 Ala. 298, that the citation was not necessary to the appeal, and that the failure of the appellant to make application for it did not affect the validity of the appeal. That the service of the citation, or the possibility of its service, ten days before any term of the court, does not affect the pendency of the appeal in the court at that term, is still further indicated by that clause

of section 3030 which directs that the cause shall not stand for trial, unless the citation was served ten days before the term. Viewing this clause in connection with that which prescribes the ten days service of notice, we conclude that the latter may operate upon the question of trial or continuance, but not upon the question of the term to which the appeal should be taken.

At the June term, 1858, without writing an opinion, we affirmed upon certificate a judgment in the case of Fair v. Williams and wife. The appeal was taken to that term of the court, within less than ten days before its commencement. The judgment in that case is a decisive precedent upon the question before us; for, if an appeal *may* be taken to the next term, which is to commence within less than ten days, it *must* be so taken. Otherwise, there would be no *rule* upon the subject. Appeals, where the interval preceding the next term was less than ten days, would be taken to the next term, or the one afterwards, at the election either of the appellant, or of the officer granting the appeal.

A further consideration, which persuades us to the conclusion indicated above, is, that if a party can make his appeal returnable to the term following the next term, it will be in his power to produce a delay in some cases where, in the absence of such a rule, he could not.

We do not think any very serious inconvenience will result from the adoption of an unbending rule, that appeals must be taken to the next term. If a case should present itself, in which a transcript could not be prepared in time to enable the appellant to file it as soon as is required, the court could always, upon application, adopt such a course as would avoid detriment to the party.

Appeal dismissed.

BINGHAM *vs.* CRENSHAW.

[APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION.]

1. *To whom administration may be granted.*—The fact that an applicant for letters of administration has, without authority, intermeddled with the intestate's effects, and disposed of some of the property belonging to the estate, does not, *per se*, disqualify him for the office of administrator, (Code, §§ 1658, 1668,) nor render his appointment irregular.

## APPEAL from the Probate Court of Limestone.

IN the matter of the estate of Mrs. Elizabeth Crenshaw, deceased, on the respective applications of Daniel H. Bingham and William M. Crenshaw for the grant of letters of administration. The intestate was the widow of Freeman Crenshaw, deceased, and died in Limestone county, the place of her residence, on the 13th October, 1857, intestate. No application was made for the grant of letters of administration on her estate, until the 2d day of March, 1859, when petitions were filed by the parties to this suit, each asking the grant of letters to himself; the petition of Bingham being first filed. The applications were brought to a hearing on the 28th March, 1859, when the following facts were disclosed by the evidence:

Freeman Crenshaw, the former husband of the intestate, died in said county of Limestone, in the early part of the year 1853, leaving a last will and testament, which was duly admitted to probate in said county on the 28th March, 1853, and by which he bequeathed sixteen negroes to his said wife, and one negro to each of his children; and by which he also devised his plantation to his wife, "for her to live on, and as many of the children to live with her as wish to do so, or to live on the above-described land, together with all the stock of every kind, blacksmith and plantation tools, and household utensils of every kind, for her use and benefit during her widowhood or lifetime, and at her death to be equally divided among my [his] children." On the 16th May, 1853,



letters of administration on the estate of said Freeman Crenshaw, with the will annexed, were granted to said William M. Crenshaw, who was his son. The children and heirs-at-law of said Freeman were also the children and heirs-at-law of his wife. "All the legacies and bequests left by said Freeman's will to his said wife, remained in her possession until her death. William M. Crenshaw occasionally acted as her agent in hiring out some of the slaves; and after her death, to-wit, on the 19th January, 1858, as the administrator of said Freeman Crenshaw, sold all the property bequeathed or devised to her by said will, for distribution among the heirs of said Freeman, under an order of the probate court of said county. It further appeared, that said William M. Crenshaw is a resident citizen of said county, is over the age of twenty-one years, is temperate, provident, honest, of fair business habits, and has never been convicted or accused of any infamous crime; and that said Daniel H. Bingham is the husband of one of the daughters of said Freeman and Elizabeth Crenshaw, is a resident citizen of said county, and over the age of twenty-one years."

"This being all the proof before the court, the court refused the application of said Bingham, and granted letters of administration to said William Crenshaw; to which said Bingham excepted," and which he now assigns as error.

D. H. BINGHAM, for appellant.—1. As the petition of Bingham was filed first in point of time, and no objection or unfitness was urged against him, he was entitled to the grant of administration, even if Crenshaw were equally fitted for the appointment.

2. Crenshaw was not a fit person to be appointed administrator, because his own illegal act, in making an unauthorized sale of the property belonging to the estate, places him in such a position that he cannot properly represent the interests of the heirs and distributees. That he is estopped from recovering the property so disposed of, see *Swink v. Snodgrass*, 17 Ala. 653; *Hopper v. Steele*, 18 Ala. 828; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

Such an illegal act, if performed by an administrator, would be good cause for his removal; and it ought certainly to be good cause against his appointment in the first instance. The causes specified in section 1658 of the Code are not the only disqualifications for the office of administrator; and what is said to the contrary in *Williams v. McConico*, 27 Ala. 574, is a mere *dictum*. A person largely indebted to the estate, and having all the evidences of his indebtedness in his own possession, would not be a fit person to administer on the estate; yet that would not be a stronger case than the one at bar.

LUKE PRYOR, *contra*.—1. As the probate court had jurisdiction of the grant of administration on Mrs. Crenshaw's estate, its action in the exercise of its discretion is not revisable, but is conclusive in favor of the appointment of the appellee.—*Miller v. Jones*, 26 Ala. 247; *Matthews v. Douthitt*, 27 Ala. 273; *Savage v. Benham*, 17 Ala. 119; *Williams v. McConico*, 27 Ala. 572.

2. If the court improperly refused to appoint Bingham, his remedy is by *mandamus*, not by appeal.—*Brennan v. Harris*, 20 Ala. 185.

3. The sale of the property by Crenshaw, if it was unauthorized, and if it operates an estoppel against his recovery of the property, yet did not disqualify him for the office of administrator.—Code, § 1658; *Williams v. McConico*, 27 Ala. 574. But it is submitted, that the sale by Crenshaw, as the administrator of his father, cannot estop him from recovering the property as the administrator of his mother.

STONE, J.—The view we take of this case renders it unnecessary that we should consider several of the questions, some of which are not free from difficulty.

More than forty days having elapsed after the death of Mrs. Crenshaw was known, and no one, within the forty days, having asserted claim to the administration under section 1668 of the Code, subdivisions 1, 2 and 3,—this appointment must depend, for its authority, on subdivision 4 of said section, which directs administration to be

granted to "such other person as the judge of probate may appoint." It is here objected, that William M. Crenshaw had, before his appointment, intermeddled in the estate of Mrs. Crenshaw—had disposed of property belonging to her estate; that he had thus disabled himself from maintaining suits for the recovery of such property, and hence his appointment was irregular and illegal.

In the case of *Chittenden v. Knight*, 2 Lee, 559, the facts were these: "Margaret Chittenden died intestate; her son, John Chittenden, and her daughter, Juliana Knight, the wife of William Knight, both prayed administration. Knight, to divest the son, J. Chittenden, of the preference which by the practice of the court he has, exhibited an affidavit that, the next day after deceased's burial, he, J. Chittenden, took possession of deceased's effects, had an inventory made of them, and delivered them without any authority to a broker, who sold them to the best bidder at a public auction." The administration was given to John Chittenden, the son.

This case is directly in point, and is an authority for holding, that the fact of intermeddling with the effects, before administration, does not, *per se*, disqualify the intermeddler. This case is quoted without dissent by Mr. Lomax, in his excellent work on Executors, vol. 1, side page, 139.

The Code sanctions the idea, that, in granting administration, males are to be preferred to females.—§§ 1670, 1673. It also clothes the probate court with a discretion, when there are several persons equally entitled to administration, to grant letters to one or more of such persons. § 1672.

We think the probate court committed no reversible error, in the appointment of Mr. Crenshaw.—See *Curtis v. Williams*, 33 Ala. 570.

In announcing the above result, we do not wish to be understood as affirming whether Mr. Crenshaw can or cannot, as administrator of his mother, maintain a suit for property sold by him, previous to his appointment. See 1 Lomax on Executors, side pages 132-3; Whitehall



v. Squire, 1 Salkeld, 295; S. C., Holt, 45; 11 Vin. Abr. 221; and authorities on the brief of counsel.

Neither do we now decide, whether there are disqualifications for the office of administrator, other than those enumerated in section 1658 of the Code.—See Williams v. McConico, 27 Ala. 572; Curtis v. Williams, 33 Ala. 570.

Nor do we now announce that, in the matter of selecting between two or more applicants, against whom there exist no statutory objections, the action of the probate court can be reviewed.—Miller v. Jones, 26 Ala. 247; Curtis v. Williams, 33 Ala. 570.

Nor need we decide, whether this appeal was prosecuted in time to raise the question of the refusal of the court to appoint Mr. Bingham administrator.—Code, § 1888, subdivision 2; Holtzclaw v. Ware, at the present term. See, also, Acts of 1857–8, p. 244.

The judgment of the probate court is affirmed.

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## STOREY vs. UNION BANK.

[ACTION ON BILL OF EXCHANGE, BY ENDORSEE AGAINST ENDORSER.]

1. *Relevancy of evidence as tending to prove nature of one's business.*—Where the question at issue is, whether a person was engaged in the business of a private banker and exchange-broker, or was acting as a bank-agent, the relevancy of the fact that, as an abstract and general proposition, the former business is more profitable than the latter, “is, to say the least of it, open to grave question.”
2. *Opinion of witness as expert.*—A witness cannot be allowed to testify, as an expert, to the abstract proposition, that it is more profitable to discount mercantile paper on private account, with borrowed money, than to act as a bank-agent.

APPEAL from the Circuit Court of Talladega.  
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the Bank of Brunswick, (now the Union Bank,) a corporation chartered in Georgia, against Alonzo G. Storey; and was founded on a bill of exchange for \$5,000, drawn by Allen Elston on Slough, Elston & Co., of Mobile, dated the 15th February, 1852, payable ten months after date, to the order of J. D. Elston, and endorsed by said J. D. Elston, W. L. Elston, Alonzo G. Storey, and J. S. Winter & Co. The complaint contained the common money counts; and the only plea was the general issue, with leave to give in evidence any special matter in bar of the suit. The defense mainly relied on was, that the bill was discounted by J. S. Winter & Co., who were bankers and exchange-brokers in Montgomery, in payment or renewal of other bills held by them on Slough, Elston & Co.; that the defendant was merely an accommodation endorser for said Slough, Elston & Co.; and that said bill, or the bill in renewal of which it was taken, was discounted by said J. S. Winter & Co. with the bills of the Bank of St. Marys, a corporation chartered by the legislature of Georgia, and as the agents of said bank, in violation of the statute laws of this State against foreign bank-agencies and the circulation of foreign bank-notes. The defendant introduced evidence tending to show, that J. S. Winter & Co. owned and controlled the Bank of St. Marys, issued and put in circulation its notes in this State, and acted as its agents; while the plaintiff contended, that J. S. Winter & Co. were merely private bankers and exchange-brokers, and borrowed from said bank the notes which they put in circulation. In rebuttal of the evidence introduced by defendant on this point, the court permitted the plaintiff to prove, by J. G. L. Huey and one Thomason, "who were exchange-brokers, and acquainted with the business of banking, that it was more profitable to borrow money and discount on private account than to act as agent for a bank." The admission of this evidence, to which the defendant excepted, is one of the matters now assigned as error.

JAS. B. MARTIN, and L. E. PARSONS, for the appellant, contended, that the evidence was not relevant to the issue,

and that the fact could not be proved by the opinions of experts ; citing the following cases : Norman v. Wells, 17 Wendell, 141 ; Fish v. Dodge, 4 Denio, 311 ; Ramadge v. Ryan, 9 Bing. 333 ; Malton v. Nesbit, 1 Carr. & P. 73 ; Donnell v. Jones, 13 Ala. 490.

Wm. P. CHILTON, and H. W. HILLIARD, *contra*.—The evidence was relevant to rebut the presumption of agency, attempted to be raised from the frequent use by J. S. Winter & Co., of the notes of the Bank of St. Marys. To reject it as irrelevant, would be to ignore the fact that men are ordinarily governed by their own interest. Moreover, if it was irrelevant of itself, it was nevertheless good in rebuttal of the defendant's illegal evidence.—Nelson v. Iverson, 24 Ala. 9.

R. W. WALKER, J.—The fact sought to be established by the opinions of the witnesses Huey and Thomason was, that it was more profitable to borrow money and discount on private account than to act as an agent for a bank. The relevancy of this fact is, to say the least of it, open to grave question. To what (if any) weight it would be entitled, in determining the question whether J. S. Winter & Co. were acting as agents for the bank, or on their individual account, would depend materially on many other facts of which no mention is made in the record. It might require more means and better credit to borrow money from a bank, than to obtain an agency. Hence, if the person whose relation to the bank was in question, was not in a condition to borrow the money, the fact that dealing with borrowed money on private account was more profitable than an agency, would be entitled to no weight. The motives which control human conduct, differ as widely as the phases of character to be found among men: The greater profitableness of one business might attract one person, while another would prefer a different employment, of which, though the profits might not be so large, the risks would be less. The choice of a profession or occupation is so much a matter of taste and inclination, and controlled by such



an infinite variety of facts, often of a private nature, that we are not able to say that, in order to determine which one of two employments an individual was engaged in at a particular period, the mere fact that one was likely to be more profitable than the other can be considered as a circumstance relevant to the inquiry.

2. But, upon the supposition that the fact was relevant, we think the evidence which the plaintiff was allowed to introduce for the purpose of establishing it was not competent. This evidence consisted of the mere opinions of witnesses, in favor of the abstract proposition, that dealing with money on private account is more profitable than a bank-agency. It is obvious, that no general rule can be laid down, as to the amount of profit which would be realized by a person dealing with borrowed money on his individual account. It is a question, which, in this case, as in all others, would depend for its solution upon complicated facts, which are not shown to have been within the knowledge of the witnesses. Much would depend on the character and habits of the person undertaking the business; much also on the terms on which, and the amounts in which money could be borrowed; and these would be regulated by the fluctuating condition of the financial world, and by the habits, means, and credit of the borrower. It is plain, too, that the inquiry could not be answered without a knowledge of the terms on which the borrowed money could be invested, the amount that could be profitably used, and the extent of losses likely to be sustained by reason of insolvencies or other causes; and these several matters would, in their turn, depend on such a number of constantly changing facts, as to render impossible the establishment of any general standard or fixed rule by which the probable profits of the business could be determined. On the other hand, the profits of a bank-agency would depend, in some degree, on the mode of compensation—whether by fixed salary, or by commissions; if by commissions, the *percentage* allowed, and the amount of money employed; and this, again, would be determined by the character and capacity of the agent, the location of the agency, the absence or presence of rival

agencies or other banking institutions, the general condition of business, and a multitude of other facts, which no human foresight could anticipate. Our opinion is that, in matters of this sort, no general rule can exist, capable of affording a test by which to determine which one of two or more employments will yield the largest profit. This was, therefore, not a case for the application of the rule which allows *experts* to give their opinions upon questions of science or trade.—Norman v. Wells, 17 Wendell, 141, 161; Donnell v. Jones, 13 Ala. 490.

The other questions presented by this record may not arise upon another trial, and we will not consider them.

Judgment reversed, and cause remanded.

A. J. WALKER, C. J., not sitting.

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## WILLIAMSON vs. SAMMONS.

[TROVER FOR CONVERSION OF HORSE.]

1. *What constitutes maintenance.*—The vendor of a chattel, having given an express or implied warranty of title, is not guilty of maintenance in upholding the suit of the purchaser involving the title.
2. *Transfer of property adversely held.*—When a chattel has been taken from the possession of the purchaser by a third person, under a *bona-fide* claim of title, and the contract of sale has been afterwards rescinded by agreement between the purchaser and his vendor, the vendor may maintain an action against such third person for the conversion.
3. *Warranty of title on sale of personalty.*—In the absence of proof to the contrary, the law implies a warranty of title in the sale of a chattel.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. ROBT. DOUGHERTY.

THIS action was brought by John H. Williamson, against Howell Sammons, to recover damages for the conversion of a horse. The plaintiff bought the horse in controversy from one Fields, in January, 1855, and after-

wards sold him to one Henry P. Graham. The defendant, having lost a horse of similar description early in January, 1855, made oath, before a justice of the peace, that the horse in Graham's possession was the same that had been lost or stolen from him, and took the horse into his own possession. The plaintiff and Graham then rescinded the contract between them for the sale of the horse, and plaintiff afterwards brought this action. "The court charged the jury, among other things, that if they believed that the defendant, at the time he took the horse from Graham, honestly believed that it was his horse; and that plaintiff, before that time, had sold and delivered the horse to Graham, and taken his note for the price,—then the right of action was in Graham; and if they believed that plaintiff and Graham, after defendant had taken the horse, rescinded their contract for the purchase and sale of the horse, and plaintiff gave up Graham's note for the horse, then the right of action was in Graham, and plaintiff could not maintain this suit; and that after the horse had been taken from Graham by defendant, under an honest belief that it was his property, Graham could not transfer that right to another, by a rescission or otherwise, so long as defendant held the horse, honestly believing it to be his." This charge, to which the plaintiff excepted, is now assigned as error.

S. LEIPER, and ALEX. WHITE, for appellant.

J. W. McRAE, and JNO. T. MORGAN, *contra*.

A. J. WALKER, C. J.—The rule which prohibits the transfer of property, adversely held, is founded in the idea, that such transfers involve the evils of maintenance. 4 Kent's Com. 446, *et seq.*; Goodwin v. Lloyd, 8 Porter, 237; Brown v. Lipscomb, 9 Porter, 472. "The reason of this rule was to prevent *maintenance*, and to prevent the weak from being oppressed by a powerful antagonist, to whom his competitor might assign his title, and who, by his wealth, his influence, or his power, might prevent the ends of justice."—Hinton v. Nelms, 13 Ala. 222.

The offense of maintenance consists in the "officious



intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute it or defend it."—4 Blacks. Com. 135. It is certain that the commission of this offense is not involved in the maintaining by the seller, who has warranted the title, of the suit of his purchaser which involves that title. The seller who has made a warranty of title has a right to aid his purchaser in a suit involving the validity of the title conveyed, and has a direct interest in the litigation. One having such an interest in a suit is not guilty of maintenance in upholding it. 6 Bacon's Abr., *Maintenance*, B. 1, page 412; 1 Story on Con. §§ 578, 579; Chitty on Con. 584; Smith on Con. 146; Addison on Con. 94.

A vendor who stands as a warrantor of the title, may take upon himself the suit of his vendee which involves that title, and may act in its prosecution as if it were his own suit, when his vendee interposes no objection. Upon principle, we can see no reason why he may not as well be permitted to take back the title, and prosecute the suit in his own name. None of the dangers or evils of maintenance would result from the allowance to a vendor of the privilege of taking back his title and maintaining it in an action in his own name, as he might do in the name of his vendee. Such a transaction does not fall within the reason of the rule which prohibits the conveyance of property adversely held.

The law, in the absence of proof to the contrary, implies a warranty of title in the sale of chattels.—Ricks v. Dillahunt, 8 Porter, 133.

Upon the reasoning above adduced, we decide that, if the plaintiff, Williamson, sold the horse which is the subject of litigation, either with an express or implied warranty of title; and that, after such sale, the defendant took the horse into his possession, and held him under a *bona-fide* claim of title, a transfer back to Williamson by the purchaser, upon a rescission of the contract of purchase made pending the adverse possession, would not be void.

There was error in the charge given by the court, for which the judgment must be reversed, and the cause remanded.

BROUGHTON *vs.* BRADLEY.

[ACTION BY FOREIGN EXECUTOR ON NOTES AND BOND.]

BRADLEY *vs.* BROUGHTON.

[APPLICATION FOR REMOVAL OF ADMINISTRATOR ]

1. *Validity of grant of administration.*—A grant of general letters of administration, by a probate court of this State, on the estate of a non-resident decedent, who died in the State of his residence, leaving a valid last will and testament, and owning property here in the county in which such letters of administration were granted, (Code, §§ 670, 1621, 1630, 1664-67,) though irregular and voidable, cannot be held void when collaterally attacked.
2. *Revocation of letters of administration.*—General letters of administration, granted by a probate court in this State, on the estate of a foreign decedent who had effects in the county in which such appointment was made, may be revoked on the application of the decedent's foreign executor, (Code, §§ 1696-97,) on proof that the decedent left a valid will, which has been admitted to probate in the foreign State in which he lived and died ; and that such administrator, pending an action against him by the foreign executor, procured the grant of administration to himself by false and fraudulent representations.
3. *For what fraud grant of administration may be collaterally impeached.*—A grant of general letters of administration, by a probate court in this State, on the estate of a foreign decedent, who, dying in the State of his residence, left assets here in the county in which such letters of administration were granted, cannot be collaterally impeached for fraud, in an action brought against such administrator by the decedent's foreign executor, on proof that the action was pending when the administrator applied for the grant of letters to himself, that he failed to state the fact of the existence of a will, and that he misrepresented the value of the assets in the county.
4. *Action by foreign executor defeated by domestic grant of administration to defendant.* In an action brought by a foreign executor, who has complied with all the requisitions of the statute, (Code, § 1934,) a plea *puis darrein continuance*, setting up the grant of letters of administration to the defendant, after the commencement of the suit, by a probate court of this State which had jurisdiction of the subject-matter, presents a good defense to the further maintenance of the action.
5. *Form of plea puis darrein continuance.*—A plea *puis darrein continuance*, pleaded "in short by consent," and stating facts which are sufficient to bar the further maintenance of the action, will not be held defective on demurrer, under the provisions of the Code, because it does not profess to be pleaded to the further maintenance of the action only, and not in bar of the entire action.

APPEALS from the Circuit and Probate Court of Lowndes. Tried before the Hon. NAT. COOK, and Hon. E. H. COOK.

THE facts shown by the records in these two cases, so far as they are deemed material, may be thus stated :

On the 12th March, 1857, Jackson J. Broughton, as the executor of the last will and testament of Edward Broughton, deceased, commenced two actions against Lawrence B. Bradley, in the circuit court of Lowndes ; one founded on a promissory note for \$125, dated the 27th December, 1850, and payable on the 1st January, 1852, to J. Brailsford ; and the other founded on a promissory note for \$500, dated the 1st February, 1851, and payable to Edward Broughton, or order, on the 1st January next after date, and a penal bond, dated the 13th January, 1851, which was conditioned for the payment by Bradley to Broughton of \$3,000, in three installments of \$1,000 each, on the 1st January, 1854, 1857, and 1860. By consent of parties, the two cases were consolidated. The defendant pleaded *non assumpsit*, payment, set-off, and that the plaintiff was not the party really interested in the suits ; and, at the November term, 1858, filed a plea *puis darrein continuance*, in these words : " Now, at this term of the court, comes the defendant, and pleads, in short by consent, that the plaintiff, at the time of the commencement of this suit, had never been appointed administrator of the estate of Edward Broughton, deceased, by any court in the State of Alabama, and had never qualified or had letters testamentary issued to him, as executor of the last will and testament of said Edward Broughton, by any court in the State of Alabama ; and defendant avers, that since the last term of this court, to-wit, on the 2d day of November, 1858, this defendant was duly appointed, by the probate court of Lowndes county in this State, the administrator of the estate of said Edward Broughton, deceased ; and that he has duly qualified as such administrator, and has entered on the discharge of the duties of said administration ; and that he is now the legal and duly qualified administrator of the estate of said Edward Broughton, deceased, within the



State of Alabama; all of which he is ready to verify. Wherefore, &c." The court overruled a demurrer to this plea, and sustained a demurrer to a special replication thereto; and issue was then joined on it, and also on the other pleas.

On the trial, as the bill of exceptions shows, the plaintiff first read in evidence the notes and bond sued on, and then offered a transcript from the records of the court of ordinary of Sumter district, South Carolina, showing the probate of the last will and testament of said Edward Broughton, deceased, and the grant of letters testamentary to the plaintiff. The will was dated 22d April, 1852, and was admitted to probate on the 22d May, 1852; letters testamentary being granted on the same day to the plaintiff, one of the executors named in the will. "The plaintiff proved, also, that said transcript was recorded in the office of the judge of probate of Lowndes county, Alabama, on the 2d July, 1858;" that on the 3d November, 1858, he executed a bond, with good and sufficient sureties, in the penalty prescribed by said judge of probate, which recited the pendency of this suit, and was conditioned that "the said Jackson J. Broughton shall faithfully administer, according to law, whatever amount he shall or may recover in said suit;" and that said bond had been approved by said probate judge.

The defendant then read in evidence his letters of administration, which were granted by the probate judge of Lowndes county on the 2d November, 1858, together with the proceedings of the court therewith connected. The defendant's petition for the grant of these letters was filed on the 2d November, 1858; and alleged, "that said Edward Broughton died, in South Carolina, about the early part of the year 1852, but owes some debts in Alabama; and that he has effects due him in Lowndes county, amounting to about \$500." On the same day this petition was filed, the defendant's letters of administration were granted by said probate court; and he gave bond, with surety, in the penal sum of \$1,000, conditioned for the faithful performance of his duties as administrator, which was approved by the probate judge. The probate

judge, who was examined as a witness by the defendant relative to these matters, "testified on cross-examination by plaintiff, that he had lived in said county of Lowndes for many years, and was intimately acquainted with all parts of the county; that no such man as Edward Broughton ever lived in Lowndes county, or had any property in said county within his knowledge, except the debt here in suit; that the defendant, when he applied for said letters of administration, stated that he was a creditor of Edward Broughton's estate; and that no other assets of said estate were mentioned, or brought to his knowledge, except the debts in suit in this case. It was admitted, that said Edward Broughton died in Sumter district, South Carolina, and lived there at the time of his death." The plaintiff then read in evidence the depositions of Thomas N. Broughton and James D. Blanding, who testified to the circumstances connected with the execution of the bond sued on, and to admissions of indebtedness on the part of the defendant; but their testimony requires no particular notice.

"This being all the evidence in the cause, the plaintiff asked the court, in writing, to charge the jury—

"1. That if they believed from the evidence that Edward Broughton, at the time of his death, was a resident of Sumter district, South Carolina; and that he left a will and testament, wherein he appointed the plaintiff his executor; and that said will was admitted to probate in the court of ordinary of said district, and letters testamentary thereon issued to the plaintiff by said court, before this suit was brought; and that the defendant, after this suit was brought, was appointed administrator of the estate of said Edward Broughton by the probate court of Lowndes county, without any probate of said will therein,—then the appointment of the defendant as such administrator was void.

"2. That if they believed from the evidence that the defendant, at the time he obtained the grant to himself of letters of administration on the estate of said Edward Broughton, was not a creditor of said estate; and that there were no creditors of said estate in said county of

Lowndes, and no property or assets therein, except the debt here sued on; and that the defendant justly owed said debt to said estate, and, pending the suit thereon by the rightful administrator, fraudulently procured said grant of administration to himself, and with the sole purpose and intention to hinder, delay and embarrass the executor in the collection of said debt,—then said appointment is void.

“The court refused each of these charges, and then instructed the jury, that if they believed all the evidence, they should find for the plaintiff, upon all the pleas except the plea *puis darrein continuance*, and should find for the defendant upon that plea.”

The plaintiff excepted to the refusal of the charges asked, and to the charge given by the court; and he now assigns the same as error, together with the rulings of the court on the pleadings, as above stated.

On the 24th November, 1858, Jackson J. Broughton filed his petition in the probate court of Lowndes county, asking the revocation of the letters of administration previously granted by said court to Lawrence B. Bradley, on the ground that they were procured by fraud on the part of said Bradley. The petition alleged, that Edward Broughton, the decedent, died in South Carolina, the place of his residence, leaving a last will and testament, wherein he appointed the petitioner his executor and made him his principal legatee; that said Broughton had never lived in Alabama, and left no property or assets here, except certain unpaid notes due to him from said Bradley, and no other assets belonging to his estate were brought into Lowndes county after his death; that the petitioner, as executor of said Broughton, instituted an action at law against said Bradley on these notes, and the cause stood for trial at the spring term, 1858; that for the purpose of hindering and delaying the collection of this debt, Bradley applied to said probate court for the grant of letters of administration on the estate of said Broughton, and falsely and fraudulently represented to the court that the property belonging to said estate,



within the limits of this State, amounted to only \$500, when in fact it was worth \$2,000, and that said Broughton owed debts in this State; that letters of administration on said estate were granted to said Bradley in consequence of these false and fraudulent representations, and the same ought to be revoked and declared void on account of such fraud.

To this petition Bradley demurred, on the following specified grounds: "1st, because the facts stated in said petition do not constitute any of the grounds for which the statutes of this State authorize the removal of an administrator; 2d, because the petition seeks to remove the administrator for a cause which, as appears from said petition, this court has adjudicated in the grant of letters of administration to respondent; and, 3d, because said petition shows that there are assets of said estate in Alabama, and were when administration was granted to respondent, and said petition does not propose or nominate any other person for the appointment of administrator, nor show any ground which would disqualify this respondent from acting as administrator." The court overruled the demurrer, and Bradley excepted.

On the hearing of the application, the petitioner offered in evidence a transcript from the records of the court of ordinary of Sumter county, South Carolina, showing the probate of the will of said Edward Broughton, and the grant of letters testamentary to himself; also, a transcript of the record of the action brought by him, as executor, against said Bradley, showing the proceedings therein had as above stated, and the notes on which said suit was founded. Bradley then read in evidence his own letters of administration, together with the other orders of the court appertaining to his appointment, and an admission of record, made by the petitioner for the purpose of preventing a continuance, to the effect that Charlotte Maples and Jared N. Cante, if present, would each swear that they were citizens of Lowndes county, and that the estate of said Edward Broughton was indebted to them at the time of Bradley's appointment as administrator. This being all the evidence, the court revoked Bradley's

letters of administration; to which he excepted, and which he now assigns as error, together with the overruling of his demurrer to the petition.

BAINES & NESMITH, and J. F. CLEMENTS, for Broughton in each case, made the following points:

1. The grant of administration to Bradley was void for want of jurisdiction in the probate court to make it. The fact of intestacy was the jurisdictional fact which was wanting. The provisions of sections 1667 and 1675 of the Code show that the law-makers intended to make intestacy a jurisdictional fact, whether the decedent was a resident or a non-resident. An examination of the old cases will show that this is but a re-affirmance of the common-law rule, which declared a grant of administration absolutely void where there was a will in existence. 1 Williams on Executors, 488-89. This is not the case of a grant of administration where the existence of a will was not known at the time, which some modern authorities hold to be voidable merely, on account of the hardship which a contrary ruling would entail on innocent purchasers: the decedent's will had been duly recorded in the probate court before the administration was granted, and its existence was well known to the applicant.

2. The grant of administration was also void for fraud in its procurement. The proposition is well settled, that any judgment or judicial proceeding may be shown to be void, in a collateral proceeding, for fraud in obtaining it. If the facts relied on to show fraud were not conclusive, their sufficiency should nevertheless have been left to the jury; yet the charge of the court took that question entirely from the jury.

3. At the time the suit was brought, the plaintiff had complied with all the requisitions of the statute, and the action is admitted to have been well brought. To allow such a suit to be defeated by a subsequent grant of administration to the defendant, particularly where the evidence shows that his sole object in procuring the grant to himself was to delay and hinder the collection of the debt, would make the statute authorizing such suits a snare

and delusion, and would place the foreign executor in a worse condition than if it had never been enacted.

4. The plea *puis darrein* professed to be in bar of the entire action, while the facts stated in it do not bar the entire action.—Stein v. Ashley, 30 Ala. 363.

5. The primary object of administration is the interest of the decedent's estate.—Lomax on Executors, 270. So far from having any interest in the estate which entitled him to administer on it, as he represented to the probate court, Bradley was indebted to the estate, and his debt constituted the only assets of the estate here; consequently, he was an unfit person to be appointed administrator, and his appointment was properly revoked on account of such unfitness. The right to remove administrators was undoubtedly conferred for the purpose of protecting estates.—Lehr v. Farball, 2 How. (Miss.) 905. Moreover, the evidence showed fraud on the part of Bradley in procuring the appointment, and collusion with pretended creditors; and this was a sufficient cause for his removal.—11 Viner's Abr. 116-17; 1 Lomax on Executors, 357. The causes of removal specified in the statute, (Code, § 1696,) include only causes which originate after the grant of administration; the statute evidently proceeding on the idea, that the letters were rightfully obtained in the first place.

WATTS, JUDGE & JACKSON, with R. M. WILLIAMSON, *contra*, made these points:

1. If the grant of administration to Bradley was merely voidable, and not absolutely void, it cannot be collaterally impeached on account of any errors or irregularities, no matter how numerous or glaring they may have been.—Miller v. Jones, 26 Ala. 259, and cases there cited; Emery v. Hildreth, 2 Gray, 228; Hutchinson v. Priddy, 12 Grattan, 85; Sadler v. Sadler, 16 Ark. 628; Riley v. McCord, 24 Miss. (3 Jones,) 265.

2. Whether the probate court had jurisdiction to make the grant of administration, must be ascertained by reference to the facts before it.—Eslava v. Elliott, 5 Ala. 264. The jurisdiction of the probate court attached, whenever



these two facts were shown: 1st, that the decedent was not an inhabitant of this State at the time of his death; and, 2d, that there were assets belonging to his estate in Lowndes county.—Code §§ 690, 1621, 1667; *Miller v. Jones*, 26 Ala. 259. If the decedent had left a will in Alabama, that would not have taken away the jurisdiction of the court to grant administration, but would only furnish ground for a revocation of the letters.—Code, §§ 1722–23. If the existence of the will made the grant void, there would be no necessity for its revocation. A will made in South Carolina, by a person who resided and died there, cannot have more potency here than a will made here by a resident of Alabama. The grant of administration, then, was voidable only, and not absolutely void.—*Kittredge v. Folsom*, 8 N. H. 98; *Baldwin v. Buford*, 4 Yerger, 16; *Burnley v. Duke*, 1 Rand. (Va.) 108; S. C., 2 Rob. (Va.) 102; *Thompson v. Meek*, 7 Leigh, 419; *Fisher v. Bassett*, 9 Leigh, 119; *Sheldon v. Wright*, 7 Barbour, 39; *Pettigru v. Ferguson*, 6 Rich. (So. Ca.) 378; *Hull v. Neal*, 27 Miss. 424.

3. The grant of administration to Bradley defeated Broughton's right to collect the debt in Alabama. As soon as Bradley was appointed, the debt due by him to the estate ceased to be a chose in action, and, in contemplation of law, became money in his possession belonging to the estate, and subject to administration in his hands. *Kennedy v. Kennedy*, 8 Ala. 394; *Childress v. Childress*, 3 Ala. 752; *Mahorner v. Harrison*, 14 Ala. 832. The right of a foreign representative to maintain a suit here is only *ex comitate*, and can never be exercised when there is a domestic representative, although the latter is merely ancillary.—Authorities above cited.

4. The probate court erred in revoking Bradley's letters of administration. The fact that, in his application for the grant of administration, he represented the value of the estate to be less than it really was, would be good ground for requiring him to give an additional bond; and the fact that he was the debtor of the estate, instead of tending to injure the estate, gives additional security for the payment of the debt, since the sureties on his

administration bond would become liable for it.—Wingate v. Wooten, 5 Sm. & Mar. 245.

STONE, J.—These two cases are so intimately connected, that we propose to consider them together.

The decision of these cases renders it necessary that we should determine whether the appointment by the probate court of Lowndes, of Mr. Bradley as administrator of Edward Broughton, deceased, was regular or irregular; and if irregular, whether the appointment was absolutely void, or only voidable. Mr. Bradley was appointed administrator generally, and not administrator with the will annexed.

Our constitutional and statutory provisions, which confer on courts of probate power to take proof of wills, and to appoint administrators and executors, are the following:

Constitution of Alabama, art. 5, § 9: "The general assembly shall have power to establish, in each county within this State, a court of probate, for the granting of letters testamentary and of administration, and for orphan's business."

Code, § 670: Courts of probate have, in the cases defined by law, original jurisdiction of:

"1. The probate of wills.

"2. The granting of letters testamentary, and of administration, and the repeal or revocation of the same."

"§ 1621. Wills must be proven in the several probate courts, as follows:

\* \* \* \* \*

"3. Where the testator, not being an inhabitant of the State, dies out of the county, leaving assets therein, in the probate court of the county in which such assets or any of them are.

"4. Where the testator, not being an inhabitant of the State, dies, not leaving assets therein, and assets thereafter come into any county, in the probate court of any county into which such assets are brought."

"§ 1630. Where the testator was not, at the time of his death, an inhabitant of this State, and his will has been

duly proved in any other State or country, it may be admitted to probate in the proper court of this State in manner following:"

Subd. 1 provides for the probate of a will, which has been admitted to probate in another State, on the production of such will and the proceedings duly certified, &c.

"§ 1658. No person must be deemed a fit person to serve as executor :

"2. Who is not an inhabitant of this State."

"§ 1664. If no person is named in the will as executor ; or if they all renounce, or fail to apply within the time specified in the preceding section, or are unfit persons to serve, the following persons are entitled to letters of administration with the will annexed, in the following order :

"1. The residuary legatee.

"2. The principal legatee."

"§ 1665. If such persons fail to apply within such time, refuse to accept, or are unfit to serve, then such letters may be granted to the same persons, and in the same order, as letters of administration are granted in cases of intestacy."

"§ 1667. Courts of probate, within their respective counties, have authority to grant letters of administration on the estates of persons dying intestate, as follows :

\* \* \* \* \*

"3. When the intestate, not being an inhabitant of the State, dies out of the county, leaving assets therein.

"4. When the intestate, not being an inhabitant of the State, dies, leaving no assets therein, and assets are afterwards brought into the county."

"§ 1676. The judge of probate may, in any contest respecting the validity of a will, or for the purpose of collecting the goods of the deceased, or in any other case in which it is necessary, appoint a special administrator, authorizing the collection and preservation of the goods of the deceased, until letters testamentary or of administration have duly issued."

We have copied above the principal provisions of both the constitution and statute laws of this State, which bear



on the question of the regularity of Mr. Bradley's appointment.

The appointment of Mr. Bradley was not that of a *special administrator* under section 1676 of the Code. His appointment was in terms general. Nor was the appointment made under section 1664 of the Code, because the facts authorizing such appointment had not then transpired. Moreover, he was not appointed administrator *with the will annexed*. The appointment, then, must rest on section 1667, subdivisions 3 and 4, of the Code, or it was improperly made. That section did not authorize the appointment, because Mr. Broughton did not die *intestate*. The appointment was, then, irregular.—1 Williams on Executors, 479. to 487.

Having attained the conclusion that the appointment of Mr. Bradley in this case was irregular, we approach the second question—viz., was the appointment void or voidable?

In the case of *Sims v. Boynton*, 32 Ala. 553, we held, that the probate court, in the matter of the appointment of administrators, possessed the properties of a general jurisdiction; and that the fact of appointment carried with it presumptive evidence of authority to make it. See the authorities therein cited. We announced the same principle in *Ikelheimer v. Chapman's Admr's*, 32 Ala. 676. See, also, authorities cited in the dissenting opinion in that case, delivered by the writer of this opinion. The question above propounded, then, is solved by answering another question—had the probate court jurisdiction to make the appointment?

We hold, that the jurisdiction of the court to make the appointment depends, not on the selection of *the person* to be clothed with the trust, but on the authority of the particular court to appoint *a personal representative* of the estate.—1 Williams on Ex'rs, 491; *Miller v. Jones*, 26 Ala. 247; *Leonard v. Leonard*, 14 Pick. 280; *Emery v. Hildreth*, 2 Gray, 228; *Sharpe v. Hunter*, 16 Ala. 759.

Applying this rule to this case, testator, at the time of his death, was not an inhabitant of this State, nor did he die in any county in this State, leaving assets therein.

No personal representative of his estate had been appointed within the State of Alabama; and he had assets in the county of Lowndes. These facts gave that court jurisdiction; and the fact that an administrator with general powers, instead of the executor, or an administrator with the will annexed, was appointed, was a question of regularity. It authorized a revocation of the appointment, but did not render it void.

We are aware that, in some of the old decisions, the appointment of an administrator, where there was a will, was said to be void.—*Abraham v. Cunningham*, 3 Keble, 725; S. C., 2 Mod. 146; *Graysbrook v. Fox*, 1 Plowd. 275.

The tendency of modern decisions, however, upon this as upon many other questions, is, not to pronounce judicial acts void, unless forced thereto by some stern rule of law, or of public policy. The consequences of pronouncing acts voidable rather than void, commend themselves by such a healthy conservatism, that courts should hesitate before declaring void what has passed judicial sanction.

In the case of *Ragland v. Gunn*, 14 Sm. & Mar. 194, a will had been probated. Subsequently the probate was set aside, and an administrator with general powers was appointed, who proceeded to administer the estate. One question made and considered was, whether, conceding the order revoking the will to have been without authority and void, the order appointing the administrator was without the jurisdiction of the court and void? It was decided, that "the [orphan's] court [of Mississippi] had jurisdiction of the subject-matter, and of the persons. The fact of the existence of a will does not withdraw the estate from its cognizance. If the executor will not act, it becomes its duty to appoint an administrator with the will annexed. If a will be produced after the grant of letters of administration, such letters may be revoked; but the acts of the administrator, consistent with law, are confirmed. We do not see, then, that this grant of administration can be regarded as void; though there is no doubt it was erroneous, and might have been revoked."—See, also, *Baldwin v. Buford*, 4 Yerg. 16; *Wilson v. Frazier*,

2 Humph. 30; Price v. Nesbit, 1 Hill's Ch. 445, 461; Saddler v. Saddler, 16 Ark. (Barb.) 628; Savage v. Benham, 17 Ala. 119; Burnley v. Duke, 1 Rand. 108; S. C., 2 Rob. (Va.) 102; Thompson v. Meek, 7 Leigh, 419; Hutcheson v. Priddy, 12 Grat. 85; Kittridge v. Folsom, 8 N. H. 98; Parkman's case, 6 Rep. (vol. 3) 19; Pettigru v. Ferguson, 6 Rich. 378; Sheldon v. Wright, 7 Barb. Sup. 39; Emery v. Hildreth, *supra*; Riley v. McCord, 24 Missouri, 265; Tebbets v. Tilton, 11 Foster, (N. H.) 273; Peterman v. Watkins, 19 Geo. 153.

Applying the principles asserted in Ragland v. Gunn, *supra*, to each of the cases under discussion, we think they settle the main questions presented by the assignments of error, adversely to each appellant. These principles are also in strict conformity with the provisions of section 1693 of the Code.

The section last mentioned, as the same appears in the printed Code, is obscure. The word *conducive*, in the fourth line, creates the difficulty. We have looked into the manuscript copy of the Code, and find the same word there written *conducive*. We have no doubt that the true word is and should be *conclusive*; and that the error originated in transcribing the manuscript. The context proves our inferences to be correct.

If the probate court of Lowndes had had no jurisdiction of the subject-matter—in other words, the testator being at the time of his death an inhabitant of the State of South Carolina, and dying there—if there had been at the time of the appointment no assets belonging to his estate in Lowndes county, then the appointment of Mr. Bradley would have been absolutely void, and would have been so declared when collaterally assailed. Section 1693 of the Code would exert no influence on such a case. See Treadwell v. Raney, 9 Ala. 590; Wilson v. Frazer, 2 Humph. 30; 1 Williams on Ex'rs, 488 *et seq.*; Duncan v. Stewart, 25 Ala. 408; Matthews v. Douthit, 27 Ala. 273; Creath v. Brent, 3 Dana, 129; Sigourney v. Sibley, 21 Pick. 101.\* See, also, Woolley v. Woolley, 5 B. & Ald. 744; Dickinson v. Naul, 4 B. & Adol. 638; Allen v. Hopkins, 13 Mees. & W. 93; Hobart v. Frost, 5 Duer, 672.



It is contended for appellant in the case of *Broughton v. Bradley*, that the circuit court should have submitted to the jury the question of fraud by Mr. Bradley in procuring the letter of administration to be issued to himself. The evidences of fraud relied on are, that Mr. Bradley did not communicate to the judge of probate the fact that decedent had left a will; and that he represented the assets within the county of Lowndes at about five hundred dollars, when he knew their value to be over two thousand dollars. There was also some testimony, the object of which must have been to disprove the statement in Mr. Bradley's petition, that decedent owed debts to persons resident in Lowndes county.

We do not think the tendency of the proof was to establish that description or species of fraud, which strangers to a judgment may prove, and thus defeat and render void a judgment of a court having jurisdiction in the premises. The argument used above, in favor of holding the appointment voidable rather than void, applies to this feature of the case, equally with that. Moreover, many of the authorities cited above show that the appointment of an administrator with general powers, made in disregard of a valid, subsisting will, is revocable, but not void. See *Cow. & Hill's* notes, part 2, 78-9-80; *Hull v. Hamlin*, 2 Watts, 354; *Postens v. Postens*, 3 Watts & Serg. 127; *Baird v. Campbell*, 4 Watts & Serg. 191; *Atkinson v. Allen*, 12 Ver. 619; *Hazelett v. Ford*, 10 Watts, 101; *Crawford v. Simonton*, 7 Por. 110.

It is also contended that plaintiff, having complied with section 1934 of the Code, had a clear right to institute his suit; and having that right at that time, if another be permitted to take out letters of administration and defeat his suit, rightfully instituted, then section 1934 does not afford the remedy intended by it.

It is a clear and undisputed proposition that, independent of our statute, no executor or administrator, receiving his authority from the courts of any country or State other than our own, could maintain, as such, any suit in this State.—*Story's Conf. of Laws*, § 513, and notes, ed. of 1857; *Vaughn v. Northrup*, 15 Pet. 1; *Harrison v.*

Mahorner, 14 Ala. 829, 833, and authorities cited; Carr v. Wiley, 23 Ala. 821.

His right to sue here is derived from our statute.—Code, § 1934.

It is equally clear that, in the absence of such legislation as is prescribed by section 1934 of the Code, when an inhabitant of another State dies, leaving effects in this State, the proper court of the county in which such effects are may grant administration on his estate.—See authorities *supra*.

This being the case, is there anything in section 1934 which takes away the jurisdiction? There is certainly nothing in its letter, for it expressly recognizes the right in such cases to grant letters testamentary or of administration in this State. Neither do we think there is anything in its spirit which sanctions such construction. Our statute is one of comity. It was doubtless framed with a view to favor, without unnecessary expense, the early settlement of estates of non-residents, who happened to own property or choses in action, within this State. If we hold that an executor or administrator, receiving his authority under foreign appointment, can, by instituting suit in this State, oust our probate courts of all jurisdiction to appoint, is it not manifest that we put it in the power of a foreign representative, by hasty action, to close the doors of our tribunals, and thus deprive resident creditors of their rights to have their claims adjusted in our probate courts out of the assets found here? The third axiom of Huberus, which may be regarded as the general law of civilized nations, declares, that “the rules of every empire from comity admit that the laws of every people, in force within its own limits, ought to have the same force every where, so far as they do not prejudice the power or rights of other governments or of their citizens.”—Sto. Confl. of Laws, § 29, and notes to § 38, edition of 1857. The principle contended for in this case, would give to the foreign laws the same force which they have within the limits of the State or nation by which they were enacted, *even to the prejudice of the rights of our citizens*. Such generosity is neither required nor expected

of any nation or State.—See *Kennedy v. Kennedy*, 8 Ala. 391, 395; *Childress v. Childress*, 3 Ala. 752.

Our statute, not creating an exclusive jurisdiction, must be held to confer only a cumulative remedy.—*Anon.* 3 Dyer, 339 *a*; *Hunt v. Wilkinson*, 2 Call, 41; *Jewett v. Jewett*, 5 Mass. 275; *Bigelow v. Bigelow*, 4 Ohio Rep. 138, 147.

If, under this construction, it be thought that a foreign representative suing in our courts is always at the mercy of a litigious debtor, the answer is, that the legislature can correct the abuse. Perhaps, in such case, a statute, prohibiting the appointment, after suit brought, of a resident administrator, except on satisfactory proof that the estate was liable for, or owed debts to residents of this State, would remedy the evil, without impairing the right.

It is objected to the plea filed *puis darrein continuance* in this cause, that it proposes to be in bar of the entire action, when the facts stated in it do not bar the entire action.

The previous decisions of this court hold, that a plea which assumes to answer the entire action, and yet offers only a partial defense, is bad on demurrer. We have, in this respect, followed the English rule.—*Stein v. Ashby*, 30 Ala. 363; *Bryan v. Wilson*, 27 Ala. 208; *Deshler v. Hodges*, 3 Ala. 509.

While it is not our purpose to shake the authority of the cases cited, so far as those cases go, we think extreme technicality in the matter of pleading should not be encouraged. Our Code has done much to strike down the former, sometimes, shadowy structure, which, we think, did not well comport with the massive proportions of the common law.

In the case of *Deshler v. Hodges*, the question did not arise, and the court simply stated the rule, holding that it did not apply in that case. In *Bryan v. Wilson*, the action was against three, and two only of the defendants pleaded a defense personal to themselves. In the commencement of their plea, they employed the words *actio non*, [the plaintiff ought not to have or maintain his action aforesaid.] This was within the rule; for the plea



offered no reason why the action should not be maintained against the third defendant.

In *Stein v. Ashby*, the defendant pleaded, *in bar of this action*, a defense which barred only a portion of the damages. This also was within the rule.

The plea in the present case professes to be in short by consent. It contains no such words as *action non*, nor, *in bar of this action*. Neither does it, in terms, propose to bar the entire suit. True, it omits the word *further*, which is usually employed in pleas *puis darrein continuance*; but we think it contains no averment, which is inconsistent with such relief. It simply sets out the facts. This, we think, under the Code, (§ 2237,) and the case of *Deshler v. Hodges*, amounts to a good partial defense to the action.—See 1 Chit. Pl. 660; 3 *ib.* 1238; *McGowan v. Hay*, 4 J. J. Mar. 223.

We are aware that, in the case of *McDougald v. Rutherford*, 30 Ala. 253, principle 3, a rule is asserted, different from what we have stated above. That suit was brought before the Code went into effect, and is consequently not governed by its provisions. We place our present opinion mainly on the provisions of the Code, which, in a great degree, dispense with the formal parts of pleading.

It results from what we have said, that there is no error in either of the records under consideration.

Judgments affirmed.

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## ATHEY vs. OLIVE.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF SLAVE.]

1. *What constitutes breach of warranty of mental soundness.*—If a slave is neither insane, nor idiotic, nor subject to any mental derangement which interferes with the natural operations of the mind, the mere fact that he has less mental capacity than is usually found among slaves does not constitute a breach of warranty of sound mind.

2. *Right of rescission by purchaser.*—If a female slave is known to be with child at the time of her sale, an offer to rescind on the part of the purchaser, made after the birth and subsequent death of the child, cannot be assumed to have been made too late, unless the purchaser had a reasonable time and opportunity, after the discovery of the facts which justify the rescission, to return the property before the death of the child.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Littleton Olive against Henry Athey, and was founded on the defendant's promissory note for \$500, dated the 14th February, 1857, and payable on or before the 1st January, 1858, which was proved to have been given in part payment for the purchase-money of a slave. The defendant pleaded, "in short by consent, 1st, the general issue; 2d, failure of consideration; 3d, breach of warranty; and, 4th, fraud, deceit and misrepresentation in the sale of the slave."

On the trial, as appears from the bill of exceptions, after the plaintiff had read in evidence the note declared on, the defendant proved that said note was given in part payment for the purchase-money of a slave named Matilda, sold by plaintiff to him on the 14th February, 1857, at the price of \$1,100; and read in evidence the plaintiff's bill of sale for the slave, which contained a warranty that the slave was "sound and healthy in body and mind." The defendant then introduced as a witness one Dr. Ponder, a physician, who testified, that he was acquainted with the slave Matilda; that said slave, while she was neither insane nor an idiot, wanted ordinary sense; that he at first attributed her want of ordinary capacity to her being in a state of parturition, but she continued to exhibit the same mental condition after her delivery; that said Matilda, if she had possessed ordinary capacity of mind, would have been worth in the market eleven or twelve hundred dollars; but, in her actual condition, was not worth more than five or six hundred dollars. Other witnesses testified, that said Matilda, at the time of the sale to defendant, was represented by plaintiff to be a good cook, washer and ironer, and seamstress; that she

came up to neither of these representations, (though the evidence on this point was conflicting,) and that she had been in plaintiff's family for some time previous to the sale to defendant. It was in evidence, also, that said Matilda was pregnant at the time of the sale, and was delivered of a child some three or four weeks afterwards; that the child lived only three or four weeks; that the defendant, prior to its death, had been heard to express himself satisfied with the trade, and to say that said Matilda was worth the money he gave for her; that he also stated, after the death of the child, that he would have been satisfied if the child had lived; and no complaint was shown to have been made by him until after the death of the child. One Clancey, a witness for plaintiff, testified, that said Matilda was a good cook, and did good washing; also, (on cross-examination,) that he was present at an interview between plaintiff and defendant in August or September following the sale, after the death of the child, when defendant offered to return said Matilda to plaintiff, and to rescind the sale,—stating that Matilda did not come up to plaintiff's warranty and representations respecting her; and that plaintiff declined to rescind the contract, and stated that it did not suit his circumstances at that time to rescind. Other witnesses testified, that Matilda had sufficient capacity to work cotton, and to do other farm work. It was further proved, that the parties lived in Pike county; that the defendant had bought Matilda for use in his family as a house servant, and had paid plaintiff six hundred dollars of the purchase-money. Plaintiff's witnesses testified as to the qualities of said Matilda, and that she was a good country cook, washer, &c.; and one stated that she sewed well. Another witness for plaintiff testified, that Dr. Ponder (defendant's witness) had recommended the woman to him as a good house servant; that no offer to rescind, or proposition to that effect, was made until August or September after the sale, which was several months after the death of the child; that prior to the offer to rescind, the woman had worked on the defendant's farm during the summer after the death of the child, and had cooked



and washed for his family, during which time he had ample opportunity to ascertain her qualities and mental condition."

The court charged the jury as follows:

"1. That if they believed from the evidence that said Matilda was neither insane, nor an idiot, nor the subject of any mental derangement which interefered with the natural operations of the mind, but merely lacked ordinary sense, this was not such unsoundness as would constitute a breach of the warranty of soundness of mind contained in the bill of sale; and that if the defendant purchased the slave in February, and waited until August or September before offering to rescind the sale, it was too late, if he had the opportunity before that time to discover the defects on which he relied for a rescission, and did not act promptly after such discovery.

"2. That if the said slave was known to be with child at the time of the sale, and the child was born after the sale, and died before any offer to rescind was made, then, an offer to rescind, made after the death of the child, was too late."

To each of these charges the defendant excepted, and he now assigns them as error.

H. W. HILLIARD, for appellant.

R. W. WALKER, J.—Where a slave is neither insane, nor an idiot, nor the subject of any mental derangement which interferes with the natural operations of the mind, the mere fact that she lacks ordinary sense does not establish a breach of the warranty that she is of sound mind. Such a warranty is not a stipulation against mental weakness, or a guaranty that the slave is possessed of ordinary capacity. We will not say that the breach of such a warranty would not be made out by proving that the slave, though neither an idiot, nor insane, was of so low a grade of mental capacity as to disqualify her for the performance of the ordinary duties of slaves. We do not understand the charge given by the court below to assert that proposition. It was simply an instruction to the

jury, that a breach of the warranty did not result from the mere fact that the slave lacked ordinary sense—in other words, that she was possessed of less mental capacity than is commonly found among slaves. Thus considered, it was free from error. A slave may possess less than the average capacity of that class of persons, and yet not be disqualified from discharging the ordinary duties imposed upon them.—*Belew v. Clark*, 4 Humph. 506; *Farnsworth v. Earnest*, 7 Humph. 24; *Sloan v. Williford*, 3 Ired. 307; *Simpson v. McKay*, 12 Ired. 141.

The court erred, however, in charging the jury that, if the woman was known to be with child at the time of sale, and the child was born after the sale, and before any offer to rescind was made, then, an offer to rescind, made after the death of the child, was too late. The charge seems to assume, that the birth of the child and its subsequent death would deprive the purchaser of his right to rescind, although the facts which would justify the rescission might not be discovered until afterwards. The error of such a view is manifest upon the mere statement of it. All that the law requires of a purchaser, who insists upon a rescission, is that he shall act promptly upon the discovery of the fraud, and return, or offer to return the property, within a reasonable time.—*Dill v. Camp*, 22 Ala. 249. If the defendant did not discover the alleged fraud until after the death of the child; or if, though he discovered it before that event, the period intervening between such discovery and death was so short, as not to afford him a reasonable opportunity of returning the property before the death of the child, it is plain that it ought not to be held that he was thereby deprived of his right to claim a rescission.

Judgment reversed, and cause remanded.

## WYATT vs. STEWART.

## [TROVER AGAINST SHERIFF.]

1. *Conclusiveness of sheriff's return.*—The sheriff's return on an execution, showing who was the purchaser at his sale, is not conclusive on the real purchaser.
2. *Retention of possession by vendor as evidence of fraud.*—The retention of the possession of personal property, by the grantor in a deed of trust for the benefit of creditors, after the property has been sold at public auction by the trustee pursuant to the terms of the deed, is not presumptive evidence of fraud.
3. *Validity of unrecorded mortgage.*—An unrecorded mortgage is valid and operative, notwithstanding the want of registration, as against a plaintiff in execution who had actual notice of it before he acquired a lien.
4. *Presumption in favor of judgment.*—To authorize the reversal of a judgment on error, on account of the refusal of a charge asked, the record must affirmatively show that the charge was correct and justified by the evidence.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Frederic Stewart, against Todd R. Wyatt, to recover damages for the conversion of twenty thousand pounds of seed cotton and nine hundred bushels of corn, which the defendant, as sheriff of said county, had seized and sold under execution as the property of one Thomas L. Pledger; and was commenced on the 14th January, 1856. The cotton and corn in controversy were raised by said Pledger, in the year 1855, on a plantation which had formerly belonged to him, but which he occupied and cultivated during the year 1855 under a lease from the plaintiff. The plantation was sold under execution against Pledger, on the 2d Monday in August, 1850, and was bought by one A. A. Sterrett, who received the sheriff's deed, and, on the 31st January, 1851, sold and conveyed the lands to Strang & Ulrick; and the latter, on the 1st February, 1851, sold and conveyed to the plaintiff. The contract between plaintiff and Pledger, under which the latter cultivated the land, and under



which the former claimed the cotton and corn in controversy, was in the following words :

“Memorandum of an agreement, made this 17th June, 1851, between Frederic Stewart, of the city of Mobile, and Thomas L. Pledger, of Shelby county, Alabama, to-wit: The said Stewart agrees to lease and to farm let unto the said Pledger that certain tract or parcel of land in Shelby county, being the same that was conveyed to said Stewart by Thomas Strang and John G. Ulrick and their wives on the 1st February, 1851, and being the farm on which said Pledger now lives; said Pledger to have the use and occupancy of the same for the term of five years from the 1st January last, or until the 1st January, 1856, on the terms and conditions following: Said Pledger agrees to pay Stewart the sum of \$500 on or before the 1st January of each year, commencing on the 1st January, 1852, and ending at the expiration of this lease, (say, on the 1st January, 1856,) making in all \$2,000; these amounts to be endorsed on the notes and claims said Stewart now holds against said Pledger. Pledger agrees to keep the arm in good order, to keep the buildings and fences in good repair, and to preserve the timber from waste. It is understood and agreed, that in case of any default in payment on the part of said Pledger, or in case of any neglect or waste of the property, then said Stewart will have the right to take possession of the same, and to eject said Pledger from the premises. It is further understood and agreed, that all the cotton made on the place is to be the property of said Stewart, or controlled by him or his agent each year, until the said sums of \$500 are respectively paid. It is further agreed on the part of said Stewart, that if said Pledger shall well and truly pay, or cause to be paid, to said Stewart, the said sum of \$2,000, in manner described above, and also all such claims or notes as said Stewart may have against said Pledger, over and above said amount, at the expiration of this lease, then said Stewart will convey to said Pledger, or to his legal representative, by quit-claim deed, all and singular the land and premises above named, for his own proper use and benefit. In witness whereof,” &c.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence the judgment and execution under which the land was sold, together with the sheriff's return on the execution, the sheriff's deed to Sterrett, the deed of Sterrett to Strang & Ulrick, the deed of Strang & Ulrick to plaintiff, and the written contract between plaintiff and Pledger above set out. The return on the execution showed that one Mazange was the purchaser at the sheriff's sale. "The plaintiff then proved, by A. A. Sterrett, that he was present at said sale, and was the highest and best bidder for said land, and that it was knocked down to him; that he was an attorney-at-law, and at that time had in his hands for collection a claim against said Pledger in favor of said Mazange; that the land sold for less than its value, and he directed the sheriff not to make him a deed until he could write to Mazange, and see whether he would not take the land; that he did write to Mazange, who refused to take the land; and that the sheriff then made a deed to him (witness) for said land, under and in pursuance of said sale. The defendant objected to all the evidence which tended to show that Sterrett, and not Mazange, was the purchaser at said sheriff's sale, because it tended to contradict the sheriff's return on the execution; but the court overruled the objection, and allowed the evidence for the single purpose of showing who was the real purchaser at said sale; and defendant excepted."

The several deeds above mentioned were duly recorded, but there was no proof of the registration of the written contract between plaintiff and Pledger. "The defendant reserved all objections to the relevancy, legality and competency of said contract as evidence. The plaintiff introduced evidence, also, tending to show that, at the time of the sale of said land by Sterrett to Strang & Ulrick, Pledger owed the latter more than \$3,000, and about \$900 to plaintiff; that Pledger held under this contract, and went on to cultivate said land, and shipped to plaintiff, for some three years, the cotton raised on the land, as the cotton of the latter; that said cotton did not, for either of said years, amount to \$500 in value; that the cotton raised on said farm in 1855 was worth about \$400; and

that defendant, in December of that year, levied on said cotton as the property of said Pledger, under an execution regular on its face, and sold the same to a third person, with notice of the plaintiff's claim to said cotton at the time of the sale."

The defendant then offered in evidence a deed of trust, dated the 30th March, 1850, by which said Pledger conveyed the said land, "together with all his property except a few household articles," to one John Sumner, as trustee, to secure a debt due to Strang & Ulrick; which deed conferred on the trustee a power of sale, and was duly recorded within the time required by law. "The defendant then proved, that said Pledger owed at that time several thousand dollars, in addition to the debt secured by said deed; that said property was sold by the trustee, at public outcry, after regular notice, in January, 1851; that said Sumner, as agent of Strang & Ulrick, bought at the sale, besides the land, two horses, a yoke of oxen, six head of cattle, a cotton-gin, and some other property; that the sale was fair and *bona fide*, and for the single purpose of securing the debt of Strang & Ulrick, who lived in Mobile; that he (Sumner) requested Pledger to allow the property to remain there, until he could receive instructions from his principals as to what he should do with it; that Pledger assented to this; that the land was shortly afterwards sold by Strang & Ulrick to plaintiff, for \$1,200, and the other property at \$284; that the money was all paid, and witness was appointed by plaintiff as his agent for the management of said property; and that Pledger continued in possession of the property under the contract hereinbefore set out. The defendant introduced evidence, also, tending to show that Pledger had been in possession of said property since the date of said sale under the deed of trust, managing and controlling it as his own, but admitting title in the plaintiff; and that he had sold the yoke of oxen, cows, some wheat and corn. But there was no evidence that the plaintiff, who lived in Mobile, or his agent, who lived twenty-nine miles distant, knew these facts, except that the latter was occasionally on the premises." The defendant then read



in evidence the judgment and execution under which he sold the cotton, "and proved that the debt, on which the judgment was founded, was in existence before and at the time said deed of trust was executed."

The defendant asked the following charges to the jury:

"1. That if they believed from the evidence that any of the personal property sold at said trust sale was bought at the sale by Strang & Ulrich, through their agent, and was left in the possession of Pledger after the sale, that fact was *prima-facie* evidence of fraud.

"2. That if they believed from the evidence that the debt, upon which was issued the execution in the hands of the sheriff, was in existence before the making of said deed of trust and said contract between plaintiff and Pledger, and that said contract never was recorded,—then said contract was void as to the plaintiff in said judgment, and the cotton levied on was subject to the execution.

"3. That if they believed the facts stated in the last charge asked, then said contract between plaintiff and Pledger was void as to the plaintiff in the judgment, as to the clause relating to the cotton raised on the land by Pledger in the year 1855, and said cotton was subject to said execution."

The court refused each of these charges, and the defendant excepted; and he now assigns as error all the rulings of the court to which he reserved exceptions.

ALEX. & JNO. WHITE, for appellant.

JAS. B. MARTIN, *contra*.

A. J. WALKER, C. J.—There was no error in allowing proof that Sterrett, to whom the sheriff conveyed the land, was the purchaser, instead of Mazange & Co., to whom the sheriff in his return asserted that the sale was made. The sheriff's return is not *conclusive* against the purchaser at his sale.—*Jackson v. Sternbergh*, 1 Johns. Cases, 153; *Mitchell v. Lipe*, 8 Yerg. 179; *Wheaton v. Sexton*, 4 Wheaton, 503; *Jackson v. Walker*, 4 Wend. 462; *Ingersoll v. Sawyer*, 2 Pick. 276.

[2.] The retention of possession after the sale, by the

maker of a deed of trust, of property sold upon notice at public outcry by the trustee, is not *prima-facie* evidence of fraud.—Montgomery v. Kirksey, 26 Ala. 172; Maulden & Terrell v. Mitchell, 14 Ala. 814. By this principle, the refusal of the court to give the first charge asked is sustained.

[3.] The second and third charges asked place the liability of the property levied on upon the ground, that the instrument by virtue of which the plaintiff claims title was a mortgage, and that it was not recorded. Notwithstanding the instrument may have been a mortgage, and may not have been recorded, it may nevertheless have been valid against the party, under whose execution the defendant, as sheriff, sold the property. If the plaintiff in execution had notice of the mortgage before he acquired a lien, it would have been valid and operative against him, notwithstanding the want of registration.—Smith v. Zurcher, 9 Ala. 208; Daniel v. Sorrels, 9 Ala. 436; Wallis v. Rhea, 10 Ala. 451; S. C., 12 Ala. 646; Jordan v. Mead, 12 Ala. 247. The inefficiency of the instrument against the execution, by virtue of which the defendant levied, was not a necessary consequence of the want of registration. It would, therefore, have been improper to have charged the jury, that the instrument, although it may have been a mortgage, was inoperative, merely on account of the want of registration, unless the proof was such as to justify the court in assuming that the plaintiff in execution did not have notice of the instrument before he acquired a lien.—Rowland v. Ladiga, 21 Ala. 9; Dill v. Camp, 22 Ala. 249. It follows, that we must not impute error to the court below, in refusing the charges, unless we can see that the assumption of the want of such notice would have been legitimate.

[4.] The bill of exceptions does not profess to bring *before* us the entire evidence which was *before the circuit judge* when he refused to give the charges. There may have been, for aught that we can affirm on the authority of the record, evidence proving, or conducing to prove, actual notice to the plaintiff in execution before he obtained a lien. "We can not reverse, merely because we cannot

see that the court below acted correctly. To authorize a reversal, it must appear from the record that the action or ruling of the court below was wrong."—*Duckworth v. Butler*, 31 Ala. 164. Here we cannot see, by looking at the record, that the court ought to have assumed the want of notice to the plaintiff in execution, and given the charges asked; nor can we see, by looking at the record, that the court ought to have refused to make such assumption, and to have rejected the charges asked. According to the rule above extracted from *Duckworth v. Butler*, we cannot reverse, because we cannot see "that the action or ruling of the court below was wrong." The presumption is not to be indulged that the court erred.—*Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Wilson v. Calvert*, 18 Ala. 274; *Dent v. Portwood*, 17 Ala. 242; *Kirkland v. Oates*, 25 Ala. 465; *Barnes v. Mobley*, 21 Ala. 238; *Doe v. Godwin*, 30 Ala. 442.

The judgment of the court below is affirmed.

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### ANDREWS vs. KEITH.

[ACTION BY SHERIFF AGAINST PURCHASER AT EXECUTION SALE.]

1. *Levy of fi. fa. against partner individually on partnership effects.*—It is settled in this State, that a sheriff, having in his hands an execution against one member of a partnership, may levy it on that partner's undivided interest in the partnership effects, and, for his own protection, may take the goods into his exclusive possession.
2. *Rights of purchaser at sheriff's sale.*—A purchaser at sheriff's sale under execution, of the interest of one of several partners, does not acquire a right to the exclusive possession of the partnership effects, but only becomes a tenant in common with the other partners; and the effects are still liable to the partnership debts, to the same extent as before the sale.
3. *Delivery of possession to purchaser.*—Although the sheriff may, generally, refuse to deliver the property to the purchaser until the purchase-money is paid or tendered; yet, if he makes it one of the conditions of the sale, when selling partnership effects under execution against one of the partners individually, that he will make actual delivery of the goods to the purchas-



er, he cannot, in an action brought by him to recover the purchase-money, be heard to insist that he had no authority, as sheriff, to make such stipulation.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by W. B. Andrews, against M. J. A. Keith, to recover the purchase-money agreed to be paid for certain pieces of marble and tomb-stones, which the plaintiff had sold, as sheriff of Dallas county, under execution against one J. M. N. B. Nix, and which were knocked off at the sale to the defendant, as the highest and best bidder. The suit was commenced before a justice of the peace, and was removed by the plaintiff, by *certiorari*, into the circuit court; and on the trial in that court, the plaintiff reserved the following bill of exceptions:

“On the trial of this cause, the evidence tended to show that the plaintiff, during the entire year 1857, was the sheriff of Dallas county, and, in January of that year, received an execution from the circuit court of Talladega county, issued on a judgment in favor of J. M. Keep against J. M. N. B. Nix, for more than \$400, besides costs; that one Griffith, a deputy of said plaintiff, on the — day of January, 1857, levied said execution on certain tomb-stones and pieces of marble, belonging to the firm of J. T. Nix & Co., in Selma; that said firm was composed of said J. M. N. B. Nix and one J. T. Nix, and was engaged in the business of cutting and dressing marble in Selma; that said tomb-stones and marble, at the time of said levy, were in the marble-yard of J. T. Nix & Co., which was then in the possession of said J. T. Nix; that said J. T. Nix was present at the time of said levy, and made no objection to it, but told the deputy-sheriff that said marble and tomb-stones belonged to the firm of J. T. Nix & Co., and that he would not allow him to take possession of them; that said deputy-sheriff, after making the levy, went off, and left said marble and tomb-stones in said yard, and did not take possession of them, except

by entering the levy on the execution; that said J. T. Nix, after said levy, remained in the possession of said yard, marble and tomb-stones, and carried on the business of the partnership, and sold and sent off part of the marble so levied on, and bought and brought into the yard two or three car loads of marble; that the plaintiff, as such sheriff, afterwards advertised for sale, under said execution, as the property of said J. M. N. B. Nix, the marble and tomb-stones so levied on; that on the day appointed by said advertisement, the plaintiff went into said marble-yard, with a number of persons, to make said sale, and found said J. T. Nix still in possession of the yard, marble and tomb-stones; that said J. T. Nix then stated to plaintiff and the other persons present, that the said yard and marble therein belonged to said J. T. Nix & Co., and that he would not allow any of said marble and tomb-stones to be taken away; that the plaintiff, as sheriff, then offered one of the tomb-stones for sale as the property of said J. M. N. B. Nix, and it was knocked off to said Keep for five dollars; that one Jones then told the plaintiff that he ought not to sell the marble by the piece, but ought to sell the interest of said J. M. N. B. Nix in all the marble and tomb-stones levied on; that plaintiff then consulted with the attorneys of said Keep, who instructed him to sell the interest of said Nix in the marble by the piece, and plaintiff then made proclamation to that effect; that some one in the crowd asked, whether the sheriff would deliver the marble to the purchasers, and plaintiff replied, that he would; and that the plaintiff also stated to the crowd, at other times during the sale, that he would not demand pay from the purchasers until he had delivered the marble to them. Some of the witnesses stated, that plaintiff proclaimed, during the sale, that he would deliver the marble to the purchasers, outside of the yard, before he would demand pay for it. As to the words used by plaintiff during the sale, there was a conflict in the evidence; and one witness testified, that he was present at the sale, but did not hear plaintiff promise to deliver the marble to the purchasers.

“The evidence further tended to show, that towards

the close of the sale, the defendant bid thirty dollars and fifty cents for certain pieces of marble, and the same were knocked off to him at that price; and that all the marble and tomb-stones in the yard at the time of the sale were sold, both that which was levied on, and that which was bought and brought into the yard after the levy. After the sale, the sheriff and the crowd went away; and said J. T. Nix remained in the possession of the yard and marble, and continued the business of the partnership as before, selling said marble, and buying other marble. After leaving said marble-yard, the sheriff instructed his agent in Selma not to receive any pay on account of said sale until he gave him directions about it, as he wished to get legal advice about the matter. Two or three days after the sale, the sheriff instructed said agent to collect the money from the purchasers at the sale; and thereupon said agent, meeting the defendant in the streets of Selma, demanded said sum of thirty dollars and fifty cents. Said agent testified, that when he made said demand, the defendant replied, that he would not pay for the marble until it was delivered; that he (witness) answered, that he would go with him to the yard and show him the marble; that defendant replied, he knew where the marble was as well as said agent, but he would send a dray up to the yard, and, if the agent would deliver the marble to him on the dray, he would pay the money; that said agent refused to do this, and the defendant did not pay the money. Another witness, who was present at the time said agent made said demand, testified, that defendant said, when the demand was made, that he would pay for the marble if the agent would deliver it according to the contract; that the agent offered to show the marble to the defendant, but did not offer to deliver it; and that he heard nothing said about a dray. The evidence further tended to show, that said marble sold for greatly less than its real value.

“ On this evidence, the court charged the jury—

“ 1. That if they believed from the evidence, that plaintiff, as sheriff, had an execution in his hands in favor of J. M. Keep against J. M. N. B. Nix, and caused the same



to be levied on certain pieces of marble in Selma, as the property of said Nix, and advertised the same for sale as the property of said Nix, and, on the day of sale, offered for sale the interest of said Nix in said marble, piece by piece; and that said marble was the property of J. T. Nix and J. M. N. B. Nix, as partners; and that plaintiff, on the day of sale, sold the interest of said J. M. N. B. Nix in said marble, piece by piece; and that the defendant bid off some of the pieces of marble at the sale, at the price of thirty dollars and fifty cents; and that one of the conditions of the sale was, that the sheriff would deliver the marble to the purchasers before he would demand pay for the same; and that he never did deliver, or offer to deliver, the marble bid off by the defendant,—then the plaintiff is not entitled to recover.

“2. That, as a general rule, if a sheriff sells the interest of one partner in the partnership effects, he is entitled to demand payment from the purchaser at the sale, without delivering the property into his possession; but, if a sheriff levies an execution against one partner on the property of the partnership, and sells the interest of said partner in said property, and makes it a condition of the sale that he will deliver the property to the purchaser before he will demand payment for the same,—then, if such sheriff does not deliver, or offer to deliver the property to the purchaser, he has no right to demand payment for it.

“The plaintiff excepted to each of these charges, and then requested the court to instruct the jury—

“1. That if the defendant knew, at the time of the sale by the sheriff, that he only sold the interest of J. M. N. B. Nix as a partner, and the claim of the other partner was fully known to the purchaser, then he is charged with notice as to the powers of the sheriff, and has no right to rely on any representations of the sheriff, as to his right to make an actual delivery of the property to the purchaser.

“2. That if the property was partnership property, and one partners' interest only was sold, the sheriff could make no delivery but such as the law implies by the pur-

chase; and if the sheriff made the declaration insisted on by the defendant, then the law will refer such declaration to such delivery as the law authorized him to make."

The court refused each of these charges, and the plaintiff excepted; and he now assigns as error the charges given by the court, with the refusal of the charges asked.

GEO. W. GAYLE, J. D. F. WILLIAMS, and JNO. T. MORGAN, for the appellant.

J. R. JOHN, and JONA. HARALSON, *contra*.

STONE, J.—It was settled in this State in 1842, that a sheriff, having in his hands an execution at law against one member of a partnership, may levy such execution upon the defendant's undivided interest in the partnership effects, and, for his own protection, is authorized to take the goods into his exclusive possession. It was also ruled in the same case, that in a suit by the firm against the sheriff, for such seizure, it is not permissible for plaintiffs to prove that their partnership effects were not more than sufficient to pay their partnership debts.—*Moore v. Sample*, 3 Ala. 319; *Waters v. Taylor*, 2 Vesey & B. 299; *Winston v. Ewing*, 1 Ala. 129.

Although there exists in the reported cases of other States, much contrariety of decision on this question, (see 1 Parsons on Con. 178—9, notes *f.* and *g.*, where the authorities are collected,) we do not feel at liberty to depart from the principle above asserted.

It is laid down in our former adjudications, that a sheriff, in levying an execution, should obtain dominion or control of the goods; but it is also settled, that if a levy be made on slaves, when they are not present and under the control of the sheriff, this does not avoid the sale afterwards made by him.—*Cawthorn v. McCraw*, 9 Ala. 519, 526; *Cobb v. Cage*, 7 Ala. 619; *McConeghy v. McCaw*, 31 Ala. 447; *McIntosh v. Walker*, 17 Ala. 20.

[2.] It is also settled in this State, that a purchaser at sheriff's sale acquires all the legal title which the defendant in execution owned, and only acquires such title as

he had subject to levy and sale under execution.—Shep. Dig. 635, § 76.

The purchaser at sheriff's sale under execution, of the interest of one of several copartners, does not acquire a right to the exclusive possession of the partnership effects. The defendant in execution had no such right. His title is that of a tenant in common with the other copartners, having the rights pertaining to such tenancy; and the effects are liable to the partnership debts to the same extent as they were before the sale.—See *Winston v. Ewing*, *supra*; *Moore v. Sample*, *supra*; *Collier on Part.* §§ 822—24; 1 *Parsons on Contr.*, *supra*; *Crocker on Sheriffs*, § 434.

[3.] It is generally the duty of the sheriff to have personal property present, in sight, when he sells under execution. He doubtless may refuse, until the purchase-money is paid or tendered, to let the property pass into the hands of the purchaser. This, however, is a matter for his determination. Whether he is required by the law to make a manual delivery of the property, we need not decide.—*Crocker on Sheriffs*, §§ 479, 480. Be this principle as it may, if the sheriff makes it one of the conditions and terms of his sale that he will make actual delivery of the goods, a purchaser has the clear right to stand on the terms of his bargain; and if in such case, the sheriff, without delivering or offering to deliver the goods, but refusing in fact to make the delivery, sue the purchaser for the amount of his bid, he will not be heard to assert that he, as sheriff, had no authority to make such bargain, and therefore is not bound by it. We can perceive no reason for a distinction between a case of this kind, and a sale by an administrator in which he makes stipulations not required of him by the law.—*Stoudenmeier v. Williamson*, 29 Ala. 558; *Atwood v. Wright*, *ib.* 346; *Rice v. Richardson*, 3 Ala. 428; *Craddock v. Stewart*, 6 Ala. 77; *Addison on Contracts*, 840—42.

The rulings of the circuit court are in strict accordance with the principles above laid down, and its judgment is affirmed.



## CURTIS vs. BURT.

[APPLICATION FOR REVOCATION AND GRANT OF ADMINISTRATION.]

1. *Implied waiver of right of administration.*—The failure of the widow to apply for letters of administration on the estate of her deceased husband, before the expiration of forty days after his death became known, is an implied waiver of her right to the administration, (Code, § § 1668—69;) and the pendency of another administration, improvidently granted before the expiration of the forty days, does not excuse her failure, nor relieve her from its consequences.
2. *Same.*—The largest creditor of the estate, having perfected his right to the administration, by filing his application, within the time prescribed by the statute, (Code, § § 1668—69,) asking the grant of administration to himself, and the revocation of letters improvidently granted to another, cannot be held to have abandoned that right, by subsequently filing another petition, asking the revocation of letters granted to the widow, without notice to him, on the resignation of the administrator whose removal he asked in his first petition.

## APPEAL from the Probate Court of Lowndes.

IN the matter of the estate of Joel Burt, deceased, on the application of Thomas D. Curtis, the appellant, asking the revocation of letters of administration previously granted to Mrs. Jane Burt, the decedent's widow, and the grant of letters to himself. The facts of the case, as shown by the petition, are these: The decedent was a resident of Lowndes county, and died in said county, on the 28th November, 1858, intestate. On the 7th December, 1858, the widow relinquished her right to administer on the estate, in favor of Thomas M. Williams, the general administrator of the county, and filed her written resignation in the probate court; and said probate court, on the 13th December, 1858, granted letters to said Williams. On the 6th January, 1859, Curtis filed his petition in said probate court, alleging that he was the largest creditor of the decedent's estate, and was entitled to administer on it; and asked the revocation of the letters granted to Williams, and the grant of letters to himself. The probate court sustained a demurer to this petition,

on the ground that it showed a valid grant of administration to Williams, and did not allege any sufficient cause for the revocation of his letters; but the supreme court, at its January term, 1859, reversed the decree of the probate court, and remanded the cause for further proceedings. See *Curtis v. Williams*, 33 Ala. 570. On the 3d May, 1859, Curtis filed in said probate court another petition, in which, after stating the facts above recited, he alleged that, on the 23d March, 1859, immediately after the reversal of the cause by the supreme court, and before any further action could be taken in the cause by the probate court, Williams resigned his administration, and the probate court, without any notice to him, immediately granted letters of administration *de bonis non* to Mrs. Burt, the intestate's widow; and asked that these letters might be revoked, and that letters might be granted to himself. The probate court sustained a demurrer to this petition, and dismissed it; to which the petitioner excepted, and which he now assigns as error.

BAINES & NESMITH, for the appellant.

WATTS, JUDGE & JACKSON, and THOS. WILLIAMS, *contra*.

R. W. WALKER, J.—The decision in *Curtis v. Williams*, made at the last term, (33 Ala. 570,) is conclusive of this case. The petition now before us alleges, that the widow and next of kin suffered forty days after the death of the intestate became known to elapse without applying for letters. The decision just cited clearly settles that they thereby forfeited their right to the administration. In that case, it was shown that, when the application of Curtis was filed, Williams was acting as administrator under an appointment by the court. We held, that this fact did not relieve Curtis of the necessity, imposed upon him by the statute, of making his application before the forty days after the intestate's death became known expired; and that he would have forfeited his right to claim the administration, if he had failed to apply for letters within that period. A like result—the forfeiture of her right to the administration—must attend the widow's

failure to apply for letters within the period designated. The statute which declares the effect of such failure, is peremptory, and without exceptions; and the pendency of Williams' administration did not suspend its operation. The statute proceeds upon the presumption, that a widow who waits forty days, without making application, does not desire the administration; and her failure to apply within that period is, as in favor of persons who succeed her in the order of right, and who have applied within the prescribed time, conclusive evidence of her relinquishment of her right.—Code, § 1669.

[2.] We do not think that the petition which the appellant filed, for the revocation of the letters issued to Mrs. Burt, can be considered as an abandonment of the application which was made by him within the forty days, for the grant of letters to himself.

The court erred in sustaining the demurrer to the petition.

Decree reversed, and cause remanded.





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## ACCOUNT.

1. *Proof of book account.*—In an action on an open account for goods, wares and merchandise sold and delivered, the only evidence being the testimony of plaintiff's clerk, who stated, in substance, that the items in the account were charged to defendant, on plaintiff's books, in his (said clerk's) handwriting; that he would not have so charged them, if the goods had not been actually sold and delivered by him to defendant; and that, independently of the entries on the books, he had no recollection whatever of the sale and delivery of the goods,—the court may instruct the jury to find for the plaintiff, if they believe the evidence, for the amount of the account and interest thereon. Knowles v. Lee & Larkins..... 181  
See CHANCERY, 1, 2.

## ACTION.

1. *By agent against principal for money paid.*—If an agent purchases articles at a store, on the credit of his principal, and afterwards voluntarily pays for them himself, he cannot maintain an action against his principal to recover the amount so paid.—Whitley v. Murray..... 155
2. *Between tenants in common.*—One tenant in common cannot maintain an action of trover against his co-tenant, without proof that the common property has been destroyed, sold, or otherwise disposed of by the defendant.—Williams v. Nolen..... 167
3. *For money voluntarily paid under mistake.*—It is a settled principle of law in this State, that money voluntarily paid, through ignorance or mistake of law, with a full knowledge of all the facts, and without fraud or imposition, cannot be recovered by action.—Town Council of Cahaba v. Burnett..... 400
4. *What constitutes voluntary payment.*—A payment of money to

## ACTION—CONTINUED.

- the clerk of the town council, as the price of a license for retailing spirituous liquors, under an ordinance afterwards declared void by the supreme court, cannot be considered to have been made upon compulsion, because the ordinance imposed a fine and imprisonment as the penalty for retailing without license; consequently, the money cannot be recovered by action. . . . . 400
5. *Against wife's administrator for supplies furnished to family during coverture.*—An action at law does not lie against the administrator of the deceased wife, to charge her separate estate with the payment of articles of "comfort and support of the household," (Code, § 1987,) furnished during the coverture. *Rodgers v. Brazeale*. . . . . 512
6. *When action for contribution accrues.*—A surety, against whom a judgment is recovered, or whose liability is otherwise fixed and matured, may pay the debt immediately, without waiting for the issue of execution; and his right of action against his co-surety for contribution accrues at the time of such payment, without reference to the time when the original contract matured.—*Stallworth v. Preslar*. . . . . 505
7. *When action for contribution lies.*—Conceding that one surety cannot maintain an action for contribution against his co-surety until he has paid a greater sum than the latter remains liable to pay; yet, if he has discharged and satisfied the entire debt, though by the payment of less than one-half its amount, he may recover contribution from his co-surety. . . . . 505
8. *Same.*—On the dissolution of an injunction, either surety on the bond has a right to pay off the amount due, without waiting for the issue of an execution, and to claim contribution from his co-surety; and his right of action is not dependent on the insolvency of their principal.—*Buckner v. Stewart*. . . . . 529
9. *Who may institute suit for freedom.*—Section 2049 of the Code, respecting suits for freedom, is not confined in its operation to persons of African blood, but includes all persons who are claimed and held as slaves.—*Farrelly v. Maria Louisa*. . . . . 284
10. *When action lies for suing out attachment.*—Under the provisions of the Code, an action on the case does not lie to recover damages for the mere wrongful suing out of an attachment without malice.—*McKellar v. Couch*. . . . . 336
11. *Revivor of action by tenant for life.*—If tenant for life bring a real action in nature of ejectment, and die pending the suit, the action cannot, either at common law, or under section 2158 of the Code, be revived in the name of the remainder-man, but can only be revived in the name of the personal representative of the deceased tenant for life.—*Mason v. Storrs*. . . . . 179
12. *Commencement of action.*—The commencement of a statutory claim suit is not the issue of the execution, nor its levy, but the making of the affidavit and the giving of the bond by the claimant.—*McAdams v. Beard & Henderson*. . . . . 478



## ACTION—CONTINUED.

13. *Premature commencement of action.*—The premature commencement of an action, when not objected to in the court below, is not available on error, (Code, § 2405,) if the complaint contains a substantial cause of action.—*Mahoney v. O'Leary*..... 97

## ACTION ON THE CASE.

See ACTION, 10.

## ADVERSE POSSESSION.

1. *What constitutes adverse possession.*—An open, notorious and public claim of title to a slave in another State, by one who acquired and held possession in this State, up to the time of his removal, in subordination to the title of another, is not sufficient to constitute an adverse possession against the true owner, who continues to reside in this State : there must be a disclaimer of the original title, and an actual hostile possession, of which the true owner had notice, or which was so ostensible and notorious as to afford a reasonable presumption of notice.—*Lucas v. Daniels*..... 188
2. *Surrender of title acquired by adverse possession.*—If the husband, having acquired title to a slave by adverse possession against the true owner, verbally consents to the execution of a deed of gift by the latter, conveying the slave to a trustee for the benefit of the husband's wife and children, it is a question for the determination of the jury, whether the husband's prescriptive title is thereby surrendered ; and a charge, asserting that such consent would not divest the title acquired under the statute of limitations, is an invasion of their province..... 188
3. *Transfer of property adversely held.*—When a chattel has been taken from the possession of the purchaser by a third person, under a *bona-fide* claim of title, and the contract of sale has been afterwards rescinded by agreement between the purchaser and his vendor, the vendor may maintain an action against such third person for the conversion.—*Williamson v. Sammons*.... 691

## AGENCY.

1. *When action for money paid lies not against principal in favor of agent.*—If an agent purchases articles at a store, on the credit of his principal, and afterwards voluntarily pays for them himself, he cannot maintain an action against his principal to recover the amount so paid.—*Whitley v. Murray*..... 155
2. *Competency of agent as witness for principal.*—In an action by a carrier to recover freight, the defense being set up that the cargo was damaged by his negligence, and that the defendant is entitled to recoup for such damages, the pilot who had charge of the flat-boat at the time of the accident, is a competent witness for the plaintiff, unless it is affirmatively shown that the

## AGENCY—CONTINUED.

- same act of negligence on his part, which caused the damage to the defendant's goods, also made the pilot liable at the suit of the plaintiff.—*Johnson v. Lightsey*..... 169
3. *Authority of agent*.—A sheriff's instructions to his jailor, to obey the orders of his deputy as his own, must be considered as including and referring to such orders only as are legal, proper, and customary.—*Nall v. The State*..... 262
4. *Criminal responsibility of principal for act of agent*.—As a general rule, the principal is not responsible *criminaliter* for the illegal act of his agent, unless done by his express authority; nor are the declarations of the agent, in the performance of such illegal act, competent evidence against the principal when sought to be charged in a criminal proceeding..... 262
5. *Attorney's authority to make admissions*.—Held, on the authority of *Rosenbaum's case*, 33 Ala. 354, that there was no error in the refusal of the primary court to suppress an admission of record made by the defendant's former attorney, on the affidavit of the defendant himself that he "supposed said admission was inadvertently made."—*Saltmarsh v. Bower & Co.*..... 613

## AMENDMENT.

1. *Of complaint*.—The refusal of the court to allow an amendment of the complaint, by the addition of a count which would not support a verdict and judgment in favor of the plaintiff, is not a matter of which he can complain on error.—*Punch & Duggan v. Walke*..... 494
2. *Of insufficient verification of claim against insolvent estate*.—The act of 1858, (Session Acts 1857–8, p. 37,) authorizing the amendment of insufficient affidavits, does not apply to a case in which nine months after the declaration of insolvency had expired before the passage of the act.—*Dennis v. Coker's Adm'r.*..... 611
3. *Of judgment nunc pro tunc*.—On motion to amend a judgment *nunc pro tunc*, entries on the court and bar docket, which are *quasi* records, are admissible evidence; and a recital in the amended judgment, that the court *is of opinion* from an inspection of said dockets, &c., is equivalent to an averment that the court deemed the evidence satisfactory, and is sufficient to sustain the amendment, unless the entries themselves are shown to be insufficient.—*Farmer v. Wilson*..... 75
4. *Same*.—When a judgment is amended *nunc pro tunc*, after an appeal has been sued out, but before the transcript has been returned to the appellate court, the amended judgment may be incorporated by the clerk in the transcript without a *certiorari*; and if the only error assigned is the rendition of judgment without proof of service, and the amended judgment shows that an acknowledgment of service was proved, the judgment will be affirmed.—*Ware v. Brewer*..... 114
5. *Of clerical misprision on error*.—A clerical misprision in entering

## AMENDMENT—CONTINUED.

- up a judgment, which might have been corrected on motion in the primary court, furnishes no cause for a reversal of the judgment, (Code, § 2401,) unless the primary court refused to correct it on motion.—*Warfield v. The State* ..... 261
6. *Same*.—In an action brought by a feme sole, whose marriage is suggested pending the suit, (Code, § 2150,) the insertion of her former name in the marginal statement of the parties in the judgment entry, being an error apparent on the record, and amendable by the record, (Code, §§ 2402, 2404,) will be regarded by the appellate court as amended.—*Lamkin v. Dudley* .... 116
7. *On error, after judgment by default, of insufficient description of parties' names in complaint*.—After judgment by default, in an action by a partnership, the failure to state the individual names of the partners in the complaint, when they are fully stated in the accompanying summons, is an error which, being amendable in the primary court, will be considered amended on error. *Gaillard v. Dubose & Co.* ..... 207
- See, also, CHANCERY, 52-3.

## ARBITRATION AND AWARD.

1. *Competency of arbitrators*.—There is no prohibition, statutory or otherwise, in this State, against a person who is related to either of the parties to a pending suit within the fourth degree of consanguinity or affinity, acting as arbitrator between them; and the fact that, by the terms of the submission, the arbitrators are to be chosen by the clerk of the court, does not affect the principle.—*Davis v. Forshee* ..... 107
2. *Validity of award*.—An award, rendered under a submission to arbitration of the matters in controversy in a pending suit, cannot be set aside on account of the relationship of one of the arbitrators to one of the parties, nor because the arbitrators allowed an illegal rate of interest in the computation of accounts. 107
3. *Voluntary nonsuit on award*.—When a pending suit has been submitted to arbitration, and an award has been rendered by the arbitrators, conforming substantially with the provisions of the Code, (§§ 2707-21,) the plaintiff cannot prevent the award from being entered up as the judgment of the court by taking a voluntary nonsuit ..... 107

## ASSUMPSIT.

1. *When workman may recover on quantum meruit*.—If work is done under a special contract, but not in a workmanlike manner, and is nevertheless accepted and used by the employer, and is of any value to him, the workman is entitled to recover its reasonable value, not exceeding the price stipulated in the special contracts.—*English v. Wilson* ..... 201
2. *Recoupment of damages by employer*.—In an action to recover the



## ASSUMPSIT—CONTINUED.

value of work and labor done, the defendant is entitled, under the general issue, (Session Acts 1853-4, p. 60,) to recoup the damages caused by the workman's breach of contract in the performance of the work..... 201

See, also, ACTION, 1-8.

## ATTACHMENT.

1. *Constable's fees for levy of attachment.*—The service of a summons of garnishment, upon a person indebted to the defendant in attachment, is a levy of the attachment, within the meaning of the act (Session Acts 1845-6, p. 163) regulating the fees of constables in Mobile.—*Cleaveland v. The State*..... 254
2. *When action lies for suing out attachment.*—Under the provisions of the Code, an action on the case does not lie to recover damages for the mere wrongful suing out of an attachment without malice.—*McKellar v. Couch*..... 336
3. *Relevancy of evidence to prove damages sustained.*—In an action to recover damages for the wrongful and malicious suing out of an attachment against a merchant, the plaintiff cannot be allowed to prove "what was the usual profit made by such establishments in the neighborhood of the plaintiff in the same kind of business."—*O'Grady v. Julian*..... 88
4. *Mode of proving damages.*—A witness may be asked to state, from his own knowledge, "what was the effect of the issue of said attachment, and the seizure and levy under the same, upon the business and credit of the plaintiff."..... 88
5. *Burden of proof as to probable cause for suing out attachment.*—In this action, the *onus* is on the plaintiff to prove the falsity of the affidavit on which the attachment was sued out, and not on the defendant to prove its truth..... 88
6. *Conflicting liens of attachment at law and equitable writ of seizure.* If a sheriff, having in his hands an attachment at law, receives a writ of seizure issued by the chancery court, before he has levied the attachment, he can only execute the chancery process, unless he can find property not embraced in the writ of seizure, on which to levy the attachment.—*Read & Co. v. Sprague & McGown*..... 101
7. *When judgment on garnishment, with satisfaction thereof, constitutes defense to action by assignee of note.*—If the maker of a note, when garnisheed as the debtor of the payee, admits an indebtedness in his answer of less than the actual amount due, and fails to state the fact that an action is pending against him by an assignee of the note, and suffers judgment to be rendered against him on his answer, when he could have successfully defended himself on account of the laches of the attaching creditor,—the payment and satisfaction of this judgment do not constitute a defense to the action on the note by the assignee. *Kimbrough v. Davis & Rand*..... 583

## ATTORNEY-AT-LAW.

See AGENCY, 5.

## BAIL.

1. *Right of bail in criminal cases.*—Under the constitution and laws of this State regulating the right of bail, a party in custody, under a charge of murder, is entitled to bail as a matter of right, even after indictment found, unless the court to which the application is made is of opinion, on all the evidence adduced, that the proof is evident, or the presumption great, that he is guilty of murder in the first degree.—*Ex parte Bryant*. . . . . 270

## BAILMENT.

1. *Bailment of bank-bills.*—A simple loan or deposit of bank-bills by a banking corporation creates the relation of creditor and debtor between the bailor and bailee, and binds the latter to repay the amount, without interest, on the demand or check of the former, but not to keep and return the specific bills received. *Wray v. Tuskegee Insurance Company*. . . . . 58
2. *Construction of special contract of bailment.*—An administratrix, who was the sole distributee of her intestate's estate, delivered certain slaves and other property belonging to the estate to her married daughter, and took from her and her husband a receipt containing the following provisions : "Said property to be used and employed by us" [the daughter and her husband] "for our sole use and benefit, but nevertheless to be subject to her order, and to be returned whenever she may make demand of us, until the day of final settlement of said estate. Without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. G.," [the administratrix,] "as sole heir to said estate, shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper ; and in case of her death before the final settlement aforesaid, then her co-administrator, A. W. S., is expressly admitted to all her rights under this instrument, for the purpose of making a final settlement of said estate ; *provided, always*, that no clause in this instrument shall be so construed as to make us liable for the non-appearance of said property, if it is detained by death or accident." *Held*, that the contract evidenced by this receipt did not pass the title to the property from the administratrix, but constituted a mere bailment to her daughter and son-in-law, which was determinable on her demand at any time before the final settlement of the estate ; with a further stipulation on her part, that if recourse to the property should not be necessary for the payment of debts, she would, when her right to the estate as sole heir accrued, substitute for that instrument such other conveyance as she might deem proper.—*English v. McNair*. . . . . 40

## BANKS AND BANKING.

See BAILMENT, 1.

CONTRACT, 7.

## BILL OF EXCEPTIONS.

1. *When necessary*.—The action of the circuit court, in striking out a plea in abatement as frivolous, cannot be revised on error, when no objection or exception was reserved to it.—*Mahoney v. O'Leary*..... 97
2. *Execution*.—In an action which was pending when the Code went into effect, and which is consequently (§12) not governed by its provisions, the bill of exceptions must be under the seal of the presiding judge.—*Moore v. Appleton*..... 147
3. *Construction*.—In an action brought by an administrator, a recital in the plaintiff's bill of exceptions, which purports to set out all the evidence, that "the plaintiff proved his demand as administrator," is sufficient to show that he read in evidence his letters of administration.—*Bell v. Andrews*..... 538
4. *Indentification of exhibits*.—Where entries on a docket are intended to be made part of the record, it is necessary that they should either be set out in the bill of exceptions or judgment entry, or be so described and identified as to prevent mistakes by the transcribing officer.—*Farmer v. Wilson*..... 75
5. *Conflict between judgment entry and bill of exceptions*.—Where there is a conflict between the judgment entry and the bill of exceptions, the latter must control the former.—*Davidson & Brady v. Street & Ferguson*..... 125

## BONDS.

1. *Validity of guardian's bond*.—Prior to the passage of the act of 1843, (Clay's Digest, 272, § 26,) the orphans' court had no authority to appoint a guardian of a child who had a living father; consequently, a bond taken by that court, prior to the passage of the act of 1843, from a father who was appointed guardian of one of his infant children, is inoperative as a statutory bond; and to render it valid as a common-law bond, it must be supported by a consideration.—*Alston v. Alston*..... 15
2. *Consideration of common-law bond of guardian*.—If a father, having been appointed without authority guardian of his infant son, and having thereupon executed a bond for the faithful discharge of his duties as such guardian, by virtue of such bond receives money or property belonging to the child, which he would otherwise have had no authority to receive, this constitutes a sufficient consideration to support the bond at common law..... 15
3. *Condition of guardian's bond*.—The fact that a guardian's bond is conditioned for his faithful performance of the "duties of guardian to the said ward," does not show that the guardianship is restricted to the person of the infant... .. 15



## BONDS—CONTINUED.

4. *Form of injunction bond, in description of obligee.*—An injunction bond, payable to “J. L. E., register in chancery,” which shows in its body that it is an obligation required by law to be made payable to the register in his official capacity, will be held good as a statutory bond, (Code, § 2973,) although the description of the obligee might raise a *prima-facie* intendment that it was payable to him individually.—*Buckner v Stewart*..... 529
5. *Same, as to amount of penalty.*—Although the statute requires that the penalty of an injunction bond shall be double the amount of the judgment sought to be enjoined, (Code, § 2973,) yet an excess of ten dollars above that amount will not destroy its validity and effect as a statutory bond..... 529

## CHANCERY.

## I. JURISDICTION.

1. *When equity will open stated account.*—Where errors have occurred in a stated account, in consequence of a fraud, equity has jurisdiction to re-examine the entire account, or to allow the injured party to surcharge and falsify it as to specified errors; but this principle only applies to those accounts of which, before they were stated, equity would have taken jurisdiction.—*Dickinson v. Lewis, Garthwaite & Co.*..... 639
2. *When equity has jurisdiction of matters of account.*—Equity will not take jurisdiction of an open account between a merchant and a manufacturer, which consists simply of items for goods sold and furnished by the latter, under a special contract, at a specified price, and credits for payments made by the former... 639
3. *When equity has jurisdiction on ground of fraud.*—If a debtor gives his note for the amount of his account as stated by his creditor, containing a fraudulent overcharge of a specified item, his remedy at law against the note, on account of the fraud, being full, adequate, and complete, he cannot come into equity for relief; and this, notwithstanding the account was contracted partly with two successive firms..... 639
4. *When equity has jurisdiction on ground of discovery.*—To maintain a bill on the ground of discovery alone, it must appear that the facts as to which a discovery is sought are material in making out the right to relief; consequently, where the only relief sought is in reference to an alleged overcharge of five per cent., in addition to costs and expenses, for goods furnished by defendant to plaintiff under a special contract, the bill cannot be maintained on the ground of discovery as to “the various items of expense involved in the original cost and manufacture of the goods,”..... 639
5. *Equitable relief against errors in probate decree.*—Under section 1915 of the Code, the distributees of an estate may obtain equitable relief against a decree of the probate court, wrongfully

## CHANCERY—CONTINUED.

- allowing to the administrator, on final settlement of his accounts, a credit to which he was not entitled, by alleging and proving that the administrator, for the purpose of preventing them from objecting to the allowance of the credit, represented to them that it was correct, and stated as facts circumstances which demonstrated its correctness; and that they, being ignorant of the facts, trusted to his representations, and forbore to object to the allowance of the credit.—*Mock's Heirs v. Steele*.... 198
6. *Jurisdiction of chancery and probate courts over settlement of decedent's estate*.—When the disbursements of an executor exceed the amount of his receipts, the probate court has no jurisdiction, on final settlement of his accounts, to render a decree in his favor for the excess; but the chancery court will grant him relief in such case, and this without requiring him first to surrender, under the decree of the probate court, property in his hands belonging to the estate.—*Reaves v. Garrett*..... 558
7. *Conflicting liens of attachment at law and equitable writ of seizure*. If a sheriff, having in his hands an attachment at law, receives a writ of seizure issued by the chancery court, before he has levied the attachment, he can only execute the chancery process, unless he can find property not embraced in the writ of seizure, on which to levy the attachment.—*Read & Co. v. Sprague & McGown*..... 101
8. *Jurisdiction of chancellor to decree alimony to wife pending suit for divorce*.—Independent of its statutory powers to make an allowance for the support of the wife pending a suit for divorce, (Code, § 1970,) the chancery court has original jurisdiction to make an order for such allowance to the wife, pending a suit by her to impeach for fraud a decree of divorce in favor of her husband.—*Ex parte Smith*..... 455
9. *Allowance to father out of child's estate for education and maintenance*.—As a general rule, the father is bound to support his minor children, if he is able to do so, although they may have property of their own; but, where he is unable to maintain and educate them suitably to their fortune, the chancery court will, on a proper application, make an allowance to him out of their separate property, either for their future education and maintenance, or as a reimbursement to him for past maintenance; and in determining the question of the father's ability, it is proper to consider the amount of his estate, the number of his children, the condition of his family, his expenses and income, and the amount of his children's fortune.—*Alston v. Alston*..... 15
10. *Same*.—Under a bill filed by a child against her father, to enforce the execution of a voluntary conveyance of slaves, with an account of their hire and profits,—*held*, on the authority of *Alston v. Alston*, (ante, p. 15,) that a reference to the master should have been ordered, to ascertain whether the defendant

CHANCERY.—CONTINUED.

- was able to maintain and educate the complainant in a manner suitable to her independent fortune ; and that, if he was unable so to maintain and educate her, an allowance should be made to him for that purpose out of her income.—*Greenwood v. Coleman*..... 151
11. *Jurisdiction of chancellor over custody of children*.—Section 2006 of the Code, unlike the act of 1833, (Clay's Digest, 171, § 20,) gives the chancellor jurisdiction of the custody and control of children, as between husband and wife, only in cases of voluntary separation.—*Bryan v. Bryan*..... 516
12. *Intemperate habits of husband as cause for removing custody of children*.—Proof of the fact that the husband was in the habit of drinking freely, and, in a few instances, to intoxication, is not sufficient to authorize the chancellor, on the application of the wife, to take away from him the custody of their children, when it is not shown that his drinking disqualifies him for business, or materially interferes with his business habits, or makes his association dangerous to his wife and children, or pernicious to the latter..... 516
13. *Original jurisdiction of chancery court over custody of children*. Independent of statutory provisions, the chancery court has jurisdiction over the custody of minor children, to be exercised for their welfare and benefit ; but it requires a strong case to induce the court thus to interfere with the common-law rights of the father..... 516
14. *When custody of children will not be taken from father*.—The chancery court will not, by virtue of its original jurisdiction over the custody of minor children, take away from the husband the custody and control of his children, (one a girl nearly five years old, and the other a boy nearly three years old,) and confide them to the wife, when it is shown that she has voluntarily abandoned her husband, against his wishes and consent, and without any legal justification for so doing ; and it does not appear that the husband's character or habits would necessarily contaminate the children, or render them unsafe in his custody 516
15. *Laches*.—Equity will not impute laches to a party, on account of his failure to institute judicial proceedings, until it is possible for him to institute a suit in which a decree might be rendered concluding the parties interested adversely to him ; as where he seeks the reformation of a deed, and the only parties adversely interested cannot be ascertained until the death of a person having a prior life estate.—*Shackelford v. Bullock*.... 418
16. *Same*.—The doctrine of laches, as applied in equity to bills for the enforcement of stale demands, is not applicable to a case in which a party seeks to establish a defense, by way of equitable set-off, against an action at law on a note given for the purchase-money of land.—*Kelly v. Allen*..... 663
- 17.—*When equity will restrain lessee from sub-letting premises*.—A



## CHANCERY—CONTINUED.

- court of equity will restrain the lessee of a store, which had been rented and used by him as a drug-store, from sub-letting the premises to another to be used for retailing spirituous liquors, when it appears that, although the contract of lease did not restrict the use of the house to any particular business, the lessee fraudulently applied for a renewal of his lease in his own name, after having agreed to sub-let the house to a licensed retailer, because he knew that the landlord would not lease the premises for that purpose.—*Parkman v. Aicardi & Tool*..... 393
18. *When equity will rescind contract on account of fraud*.—A contract for the sale of the patent right to make, use and vend, within a specified territory, an improved kind of loom, will be rescinded in equity, on the timely application of the purchaser, on proof that the vendor, who was also the inventor, grossly misrepresented the capacity of the loom and his own success in selling and put it in operation; and that the purchaser, being ignorant of these matters, was induced by these misrepresentations to enter into the contract.—*Pierce v. Wilson*..... 596
19. *Waiver of right of rescission by laches and subsequent ratification*. Where the contract was made on the 8th June, 1853; and the vendor's representations respecting the subject of the sale—the patent right for an improvement in looms—related to its adaptedness to be worked by hand, and to be driven by machinery in factories; and the purchaser, having discovered the falsity of the former representations, proposed a rescission in November, 1853, which the vendor declined; and the purchaser afterwards made renewed efforts to obtain a model loom, of the size and description specified in the contract, and also endeavored to sell looms in the district of country embraced in his purchase, representing that they could be successfully worked by machinery in factories; and, having failed in all his efforts, filed his bill to rescind in February, 1856,—*held*, that there was nothing in these circumstances which amounted to a waiver or forfeiture of the right of rescission, which had been duly perfected by the offer to rescind in November, 1853..... 596
20. *When purchaser may come into equity, to obtain compensation, or abatement of purchase-money*.—A purchaser's remedy, on account of his vendor's misrepresentations respecting the boundaries of the land, being adequate and complete at law, either by an action for damages before the Code, or by plea of set-off under the Code to an action on the notes given for the purchase-money, he cannot, in the absence of some special equity, maintain a bill in chancery for compensation, or an abatement of the purchase-money; but the removal of the vendor from this State, and his subsequent death in a foreign State, where his estate has since been settled up and distributed, afford a special ground for equitable relief, in a case not governed by the Code.—*Kelly's Heirs v. Allen*..... 663

## CHANCERY—CONTINUED.

21. *Same*.—The doctrine is now well settled in this State, that a purchaser cannot come into equity, to obtain compensation, or an abatement of the purchase-money, on account of a deficiency in the quantity of the land, or the fraudulent misrepresentations of his vendor as to its quantity or quality, unless his bill also shows some other independent ground of equitable relief.—*Bell v. Thompson*. . . . . 633
22. *Partial specific performance*.—If the purchaser, having entered into the contract in ignorance of his vendor's incapacity to give him the entire tract of land, chooses afterwards to take as much as he can get, he has a right to insist on a specific performance to that extent, with compensation, or an abatement of the purchase-money, for the deficiency. . . . . 633
23. *When mortgage sale will be set aside in equity, on account of trustee's misconduct*.—The fact that a trustee, in making a sale of property under mortgage or deed of trust, knew that the purchaser was bidding for the mortgagee, is not sufficient to induce a court of equity to set aside the sale.—*Lucas v. Oliver*. . . . . 626
24. *Application of maxim, that he who seeks equity must do equity*. When a purchaser of land, holding possession under his vendor's bond for title, files a bill in equity against the vendor and a subsequent purchaser, to obtain a conveyance of the legal title, which such subsequent purchaser has procured by patent from the United States, the complainant will be required, before obtaining any relief, to repay to the subsequent purchaser the amount expended by him in procuring his patent, with interest. *Pearce v. Nix*. . . . . 183
25. *Trust implied and enforced against self-constituted agent and guardian*.—Where the defendant undertook to become the guardian of his infant sister-in-law, and to bid in for her, at the sale of the personal property belonging to the estate of her deceased father, certain slaves to which she had a family attachment; and, in pursuance of his promise, but before taking out letters of guardianship, bought the slaves at the sale, professedly for the infant, and thereby obtained them at an inadequate price,—*held*, that these facts establish a trust, at the election of the infant, which a court of equity will enforce in her favor.—*Belcher v. Sanders*. . . . . 9
26. *Trust implied against holder of legal title*.—A patent being issued to a Choctaw Indian "and his heirs," for all the lands to which he and his several children were entitled as their reservations under the treaty of 1830, a court of equity will hold the legal title subject to the equitable rights secured to the children by the treaty.—*Wilson v. Wall*. . . . . 288
27. *Trust not implied against husband, in favor of wife*.—An agreement on the part of the husband, to pay for certain slaves, purchased by him at the administrator's sale of the estate of his wife's deceased father, out of his wife's distributive share of

## CHANCERY—CONTINUED.

the estate, which constituted a part of her separate estate under the statutes of this State, does not constitute him a trustee for his wife, when it appears that he took the title in his own name, and that the purchase-money was afterwards paid by the wife, as his executrix, out of her distributive share. *Reaves v. Garrett*. . . . . 558

## II. PLEADING AND PRACTICE.

28. *Parties to bill for reformation of deed*.—To a bill filed by the husband, asking the reformation of a deed of marriage-settlement, on the ground of fraud or mistake, in the insertion of a provision giving a contingent remainder, on the death of the wife leaving no children, to her "natural heirs," instead of the husband,—the "natural heirs" of the wife, who cannot be ascertained until her death, are necessary parties; and their interests cannot be represented by any other parties.—*Shackelford v. Bullock*. . . . . 418
29. *When administrator of insolvent estate may sue*.—The administrator of an insolvent estate, whose intestate had an undivided half interest as tenant in common in a block of stores, may maintain a bill in equity against the lessee of one of the stores, to restrain an improper sub-letting, which would impair the value of the property, and diminish the amount of the rents. *Parkman v. Aicardi & Tool*. . . . . 393
30. *Non-joinder of parties plaintiff*.—Conceding that a surviving tenant in common in land should be joined as co-plaintiff with the administrator of his deceased co-tenant, in a suit instituted by the administrator, yet his absence from the State is a sufficient reason for making him a defendant. . . . . 393
31. *Misjoinder of parties plaintiff*.—The rule is well settled, that where two join as plaintiffs in a bill, both must have an interest in the subject-matter of the suit, and both be entitled to relief; and if the bill itself shows that one of them is not entitled to any relief, it is demurrable.—*Vaughn v. Lovejoy*. . . . . 437
32. *How nature of bill is determined*.—The real nature of a bill in chancery is to be determined rather by its substance—that is, by its allegations and object—than by the title given to it by the pleader.—*Ex parte Smith*. . . . . 455
33. *Bill to impeach final decree for fraud*.—A bill which seeks to impeach a final decree for fraud, is not a bill of review, nor a supplemental bill in the nature of a bill of review, but an original bill in the nature of a bill of review. . . . . 455
34. *Sufficiency of averments of bill*.—An averment that the complainant "is informed and believes" that a certain material fact exists, is not equivalent to an averment of the existence of that fact; but an averment of the existence of the fact, "as complainant is informed and believes," is sufficient.—*Lucas v. Oliver*. . . 626



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35. *Alternative averments.*—Where the equity of a bill rests on the existence of one of two facts, which are stated disjunctively, and one of which is not sufficient to uphold the bill, the averment is insufficient. . . . . 626
36. *Allegations of bill for specific performance.*—In a bill for specific performance, the complainant must show, not only that he has performed, or offered to perform, the acts which formed the consideration of the contract on his part, but also that he demanded performance by the defendant before filing his bill, and that the latter refused to comply with such demand.—*Bell v. Thompson*. . . . . 633
37. *Averments of purchaser's bill for compensation.*—When a purchaser files a bill in equity for compensation, or an abatement of the purchase-money, on account of his vendor's misrepresentations respecting the boundaries of the tract, he must allege, either that the quantity of the land conveyed to him was less than he contracted for, or that the land falsely represented to be included within the boundaries of the tract was of greater value than the residue, or possessed some peculiar advantages. *Kelly's Heirs v. Allen*. . . . . 663
38. *Allegations of vendor's bill to enforce lien for unpaid purchase-money.*—Although, under an executory contract of sale, the necessity for a formal tender of a conveyance by the vendor on the appointed day is dispensed with, if the purchaser has previously notified him that he would not take the property; yet, if the vendor afterwards files a bill in equity to have the land sold for the payment of the purchase-money, his bill so far partakes of the character of a bill for specific performance, as to make it necessary for him to show that, on the appointed day, he was, or at least would have been, if the contract had not been renounced by the purchaser, able, ready and willing to make full performance of all the stipulations of the contract on his part.—*McKleroy v. Tulane*. . . . . 78
39. *Allegations of creditor's bill, and how to take advantage of defect.* It is a necessary allegation of a creditor's bill that the complainant is a creditor of the defendant; and the want of such an allegation is a defect which is available on the hearing.—*Walthall v. Rives, Battle & Co.*. . . . . 91
40. *What relief may be had under creditor's bill.*—A creditor may file his bill with a double aspect; asking to have a mortgage, executed by his debtor, declared fraudulent and void, or, if not fraudulent, foreclosed for his benefit; but he cannot have a foreclosure, when his bill alleges that the mortgage has been satisfied and discharged. . . . . 91
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- of the defendants, although the omission seems to have escaped the notice of the chancellor and counsel in the court below. *Alston v. Alston*..... 15
42. *When cross bill is unnecessary*.—Under a bill for the settlement of a guardian's accounts, the defendants can obtain the benefit of credits and matters of discharge by answer; consequently, a cross bill is unnecessary, and cannot be supported..... 15
43. *Variance*.—It was objected in this case, that there was a fatal variance between the allegations and proof, because the bill alleged one entire contract, while the proof showed two distinct contracts; but the court held, that the evidence established one entire contract, as stated in the bill, although several writings were executed between the parties, which did not refer to each other.—*Pierce v. Wilson*..... 596
44. *Same*.—Where a bill, seeking equitable relief against a contract on the ground of fraud, alleges that the fraud was knowingly perpetrated by the vendor, and the evidence fails to show that the misrepresentation was intentional, the variance is immaterial.—*Kelly's Heirs v. Allen*..... 663
45. *Burden of proof*.—When a sworn answer is not waived, an answer under oath, denying the allegations of the bill, casts upon the complainant the *onus* of sustaining those allegations by two witnesses, or by one witness with corroborating circumstances.—*Bryan v. Bryan*..... 516
46. *Same*.—The testimony of two witnesses, or of one witness with corroborating circumstances, is necessary to overcome the denials of a sworn answer, which is responsive to the allegations of the bill.—*Camp v. Simon*..... 126
47. *Same*.—When a material allegation of the bill is denied, on information and belief merely, by all the defendants, except one as to whom an answer under oath was waived, and by whom the allegation is denied from knowledge, it is not incumbent on the plaintiff (Code, § 2877) to establish the fact by two witnesses, or by one witness with corroborating circumstances.—*Pearce v. Nix*..... 183
48. *Responsiveness of answer, and effect as evidence*.—An answer responsive to an interrogatory, as to any matter relevant to the allegations or charges of the bill, is evidence against the complainant, and throws on him the burden of disproving it.—*Walthall v. Rives, Battle & Co*..... 91
49. *Mode of computing damages to purchaser on account of misrepresentation of boundary lines*.—In computing the damages to which a purchaser is entitled, by way of compensation, or abatement of the purchase-money, on account of his vendor's falsely representing certain adjacent lands as included within the boundaries of the tract sold, the correct rule is to ascertain the average value, per acre, of the tract actually sold and conveyed, and what would have been its average value if it had included

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- such adjacent lands; the difference between the two amounts being the measure of damages to which the purchaser is entitled.—*Kelly v. Allen*. . . . . 663
50. *Mode of stating partnership accounts*.—In stating the accounts of an equal partnership between three partners, under a bill filed by two against the third, the latter being the sole active manager of the business, the profit and loss account should be first adjusted, by ascertaining the gross income and expenses of the partnership, and striking a balance between the two sums; and a separate account with each partner should then be stated, for the purpose of apportioning the profits, or equalizing the losses: a simple debtor and creditor account, between the complainants on one side and the defendant on the other, is incorrect and erroneous.—*Collins & Langworthy v. Owens*. . . 66
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52. *Remandment of cause, on reversal, for amendment of bill*.—When an objection to the equity of a bill, founded on the want of a necessary allegation, is overruled by the chancellor, and his decision on that point is reversed on error, the appellate court will remand the cause, in order that the complainant may apply for leave to amend his bill.—*Walthall v. Rives, Battle & Co.* . . . 91
53. *Same*.—When a material defect in the bill, to which the attention of the chancellor was not called, is noticed for the first time in the appellate court, on errors assigned by the defendant, the cause will be remanded.—*Kelly's Heirs v. Allen*. . . . . 663
54. *Costs*.—A decree in chancery cannot be reversed, on error or appeal, solely on account of an error in the imposition of costs.—*Bryan v. Bryan*. . . . . 516

CHARGE OF COURT.

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2. *Charge assuming fact not proved*.—A charge which assumes as true a fact which has not been proved, is erroneous.—*Johnson v. Marshall*. . . . . 522
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## CONFLICT OF LAWS.

1. *As to respective rights of husband and wife in real and personal property.*—The respective rights of husband and wife, in and to lands situated in Mississippi, under a conveyance executed in Alabama, where all the parties to the deed then resided, are to be determined by the laws of Mississippi; but, as to slaves and personal property conveyed by the same deed, their rights are to be determined, as between themselves, by the laws of Alabama.—*Nelson v. Goree*..... 565

## CONFUSION OF GOODS.

1. It was contended in this case, that the plaintiff, having mingled his own goods with the defendant's, could not recover at all; but the court, after citing the authorities bearing on the doctrine of confusion of goods, placed its decision on another ground.—*Nelson v. Goree*..... 565

## CONSTITUTIONAL LAW.

1. *Prohibitory liquor law.*—The fourth section of the act "to incorporate the Southern University of Greensboro," (Session Acts of 1855-6, p. 221,) which prohibits the sale of any kind of spirituous or intoxicating liquors within five miles of Greensboro, is not violative of any provision of the State constitution.—*Dorman v. State*..... 216
2. *Who may attack constitutionality of such law.*—When a party is indicted for the violation of a State law, prohibiting the sale of spirituous liquors within a certain territory, he cannot be heard to impeach the validity of the law, on the ground that it is violative of the constitution of the United States and the acts of congress regulating the importation and sale of liquors, unless he shows that he is an importer, and that he sold the liquors in the casks in which he imported them..... 216
3. *Statutes authorizing establishment of private roads and erection of mill-dams.*—The several statutes of this State, authorizing the establishment of private roads across the lands of third persons, (Code, §§ 1187-88,) and the condemnation of their lands for the erection of mill-dams, (§§ 2089-2105,) are unconstitutional, inasmuch as they authorize the taking of private property for other than public uses; and the fact that such statutes have long been in existence is not a sufficient reason why the courts should not now declare them unconstitutional.—*Sadler v. Langham*, and *Moore v. Wright & Rice*..... 311
4. *Public road law.*—The public-road law of this State, in providing for the assessment of damages to the person through whose lands any road is opened, and securing the payment of such damages before the property is taken, (Code, §§ 1136-38,) meets the constitutional requisition that "just compensation be made" for private property taken for public use; and when a public road has been changed or established by an order of the commissioners' court, the appellate court cannot revise the discre-



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- tionary power vested in that tribunal, on the ground that its action was not for the public benefit.—Comm'rs' Court of Lowndes Co. v. Bowie..... 461
5. *Construction of treaties.*—Treaties are the supreme law of the land ; rights which have vested under them, cannot be destroyed or affected by the action of either the legislative or the executive department of the government, nor by the rules of practice adopted by the officers of any department of the executive government ; nor are the courts, in determining those rights, to be controlled by the action or rules of practice of the other departments of the government.—Wilson v. Wall..... 288

## CONTRACTS.

1. *Construction of special contract.*—Under a written contract, by which defendant agreed to deliver to plaintiff two notes on third persons, or, in the event of his failure to do so, "*to make satisfaction within four weeks,*" the alternative stipulation binds the defendant to make such compensation as the law appoints for his failure to deliver the notes.—Moore v. Fleming..... 491
2. *Construction of executory contract of sale as to stipulations for covenants by vendor.*—A stipulation on the part of the vendors, in an executory contract of sale, that they will make, or cause to be made to the purchaser, "a good and sufficient deed or other conveyance or conveyances in the law for conveying and assuring" the property to the purchaser, "which deed or deeds shall contain the usual full covenants and warranty of title of the premises to the party of the second part, free and clear of all liens and incumbrances whatsoever,"—binds them to deliver deeds containing covenants equivalent, in extent and operation, to the covenants of seizin, freedom from incumbrances, and general warranty.—McKeleroy v. Tulane..... 78
3. *Construction of special contract of bailment.*—An administratrix, who was the sole distributee of her intestate's estate, delivered certain slaves and other property belonging to the estate to her married daughter, and took from her and her husband a receipt containing the following provisions : "Said property to be used and employed by us" [the daughter and her husband] "for our sole use and benefit, but nevertheless to be subject to her order, and to be returned whenever she may make demand of us, until the day of final settlement of said estate. Without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. G.," [the administratrix,] "as sole heir to said estate, shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper ; and in case of her death before the final settlement aforesaid, then her co-administrator, A. W. S., is expressly admitted to all her rights under this instrument, for the purpose of making a final settlement of

## CONTRACTS—CONTINUED.

said estate; *provided, always*, that no clause in this instrument shall be so construed as to make us liable for the non-appearance of said property, if it is detained by death or accident." *Held*, that the contract evidenced by this receipt did not pass the title to the property from the administratrix, but constituted a mere bailment to her daughter and son-in-law, which was determinable on her demand at any time before the final settlement of the estate; with a further stipulation on her part, that if recourse to the property should not be necessary for the payment of debts, she would, when her right to the estate as sole heir accrued, substitute for that instrument such other conveyance as she might deem proper.—*English v. McNair*..... 40

4. *Construction of agreement of record*.—In an action against a sheriff's sureties on their bond, the plaintiffs having entered a *nolle-prosequi* as to their original complaint, and filed an amended complaint, the parties thereupon entered into an agreement of record, in these words: "That the pleadings in the case of J. M. S. against these defendants, which put in issue the sufficiency of the complaint, the *factum*, or legal effect of said alleged bond, or the right of the plaintiffs to sue on the same, and the judgment rendered by this court or the supreme court on said questions, shall be taken to be, and shall be, the same in this case." At the time this agreement was made, an amended complaint in the case therein referred to had been filed, to which the defendants had interposed a demurrer, on the ground that the complaint showed that the bond sued on had not been legally executed, and failed to show any right of action in the plaintiff. At the next term, the court sustained the demurrer, and the plaintiff thereupon took a nonsuit, with a bill of exceptions, and carried the case by appeal to the supreme court, where the judgment of the circuit court was affirmed. *Held*, That the agreement did not authorize the court, while sustaining a demurrer to the complaint on file, to allow an amended complaint to be filed, obviating the effect of the decision of the supreme court in the other case. (R. W. WALKER, J., *dissenting*.) *Ex parte Lawrence*..... 446
5. *Waiver of right of set-off by contract and breach thereof*.—Defendant having a judgment against plaintiff and another, (the latter as surety of plaintiff,) and plaintiff having at the same time an unsatisfied account against defendant; an agreement between them that the account should be credited on the judgment, coupled with the transfer of the account by plaintiff to his surety, in order that it might be so credited for his protection, and the subsequent breach of the agreement by defendant, in coercing satisfaction of the entire judgment out of the surety, —do not prevent defendant, when sued on the account by plaintiff, for the use of his surety, from pleading as a set-off any

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- other demand due to him by plaintiff.—*Saltmarsh v. Bower & Co.*..... 613
6. *Validity of contract in contravention of public policy.*—A contract by which one party, having illegally changed and obstructed a public road, agrees to indemnify the other, who was liable to work on the road, against all costs and damages which he might sustain in a prosecution as a defaulter, if he would refuse to work on the road, is in contravention of public policy, and therefore void.—*James v. Hendree*..... 488
7. *Validity of contract for purchase and discount of bill of exchange by corporation.*—In an action on a bill of exchange by a private domestic corporation, having power under its charter "to purchase, discount and sell bills of exchange," but prohibited from making or issuing any bills, bonds, notes or other securities to circulate in the community as money, a plea, averring that the plaintiff procured from a foreign bank a loan or deposit of a large amount of its notes, for the unlawful purpose of issuing and putting said notes in circulation in this State, "and under an express agreement with said bank to redeem said notes as the same should be returned to the counter of said bank by which they were issued;" that plaintiff, with the bank-notes thus obtained, "made discounts, purchased bills, and did other business pertaining to banking," and issued and put said notes in circulation as money; that the bill of exchange sued on was made for the benefit of defendant, "and with the intent to have the same discounted by plaintiff, either with said foreign bank-bills or some other bank-bills, as plaintiff might see fit and proper;" that it was presented at plaintiff's banking-house for discount, "and was then and there accepted and discounted by plaintiff with said foreign bank-bills;" that plaintiff, in thus using said foreign bank-notes in the purchase and discount of said bill, "did emit, issue and put them in circulation in this State;" and that this was the only consideration given by plaintiff for said bill of exchange,—does not show any illegality of consideration in the contract by which plaintiff obtained the bill of exchange; the averments not being sufficient to show the existence of any agency between plaintiff and the foreign bank, within the meaning of section 939 of the Code, nor a violation of the plaintiff's charter.—*Wray v. Tuskegee Ins. Co.*.... 58
8. *When contract of sale is complete, and what constitutes valid modification.*—The rulings of the court in this case, in the matter of instructions to the jury, tested by the principles settled on a former appeal, (*Thomason v. Dill*, 30 Ala. 444.) and held correct. *Thomason v. Dill*..... 175
9. *When contract of sale is complete.*—Upon the delivery to the purchaser of an article manufactured for him, and its acceptance by him, (if not sooner,) the contract of sale is complete, and the



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- title to the article vests in the purchaser.—*Jemison v. Woodruff & Beach*..... 143
10. *Rescission of contract by purchaser*.—After a contract of sale is complete, and the title to the article sold has vested in the purchaser, he cannot rescind or annul the contract, on account of the vendor's breach of warranty, or fraudulent representations as to the quality of the article, without placing or offering to place the vendor *in statu quo*..... 143
11. *How far fraud and breach of warranty constitute defense to action for purchase-money*.—In an action against the purchaser, to recover the price agreed to be paid for an article sold and delivered to him, he cannot, while he retains the article, and has not offered to rescind the contract, avoid the payment of the entire purchase-money, on the ground of fraud or breach of warranty, unless the article is altogether valueless..... 143
12. *Breach of contract by employee*.—If an overseer, having contracted to serve his employer for the term of one year, and stipulated that, in the event of his failure to comply with any of the conditions of the contract, he should not recover any compensation for the services which he might have rendered, voluntarily leaves the service before the expiration of the year, he cannot recover any compensation, without proving that he was discharged by his employer, or that the employer had violated the contract on his part.—*Whitley v Murray*..... 155
13. *Rights, duties and liabilities of purchaser on rescission of contract*. On the refusal of the vendor to receive a slave, when tendered back by the purchaser, in a case which authorizes a rescission of the contract on the part of the latter, the purchaser is not bound to abandon the slave, but may retain it as the bailee of the vendor; and the fact that he permits the slave, while thus remaining in his possession, to work voluntarily for him, does not render him liable in trover at the suit of the vendor. *Rand v. Oxford*..... 474
- See, also, CHANCERY, 18-22.

## COSTS.

1. *On successful plea of set-off*.—Where a set-off is pleaded and controverted, and the witness by whom it is established is sought to be impeached, the defendant is entitled to recover (Code, § 2378) the costs of all the witnesses, without regard to their number, who were summoned for the purpose of impeaching or sustaining said witness, and examined on the trial.—*Fuller v. Hunter*..... 56
2. *In chancery*.—A decree in chancery cannot be reversed, on error or appeal, solely on account of an error in the imposition of costs.—*Bryan v. Bryan*..... 516
3. *In prosecution by apportioner against overseer of road*.—When an

COSTS—CONTINUED.

- action is instituted against a defaulting overseer of a public road, for a neglect of his official duty, (Code, § 1172,) the apportioner who made the return, and at whose instance the summons was issued, is not liable to a judgment for costs when the proceeding is quashed in the circuit court.—*Salter v. Ivey*..... 557
4. *Security for costs*.—A trial of the right of property is not within either the letter or the spirit of section 2396 of the Code, which requires security for the costs in actions commenced by or for the use of a non-resident.—*McAdams v. Beard & Henderson*... 478
5. *Waiver of security for costs*.—In an action brought by a non-resident, and commenced in a justice's court, if the defendant appears before the justice, and engages in a trial on the merits, he cannot, after the cause has been removed by the plaintiff to the circuit court, move to dismiss it for want of security for the costs.—*Duncan v. Richardson*..... 117
6. *Constable's fees for levy of attachment*.—The service of a summons of garnishment, upon a person indebted to the defendant in attachment, is a levy of the attachment, within the meaning of the act (Session Acts 1845-6, p. 163) regulating the fees of constables in Mobile.—*Cleaveland v. The State*..... 254

CRIMINAL LAW.

1. *Criminal responsibility of principal for act of agent*.—As a general rule, the principal is not responsible *criminaliter* for the illegal act of his agent, unless done by his express authority; nor are the declarations of the agent, in the performance of such illegal act, competent evidence against the principal when sought to be charged in a criminal proceeding.—*Nall v. The State*..... 262
2. *What constitutes negligent escape*.—If a sheriff discharges the duties of his office so negligently that, in consequence of such negligence, a prisoner leaves the jail, and walks out into the surrounding town, though for a few minutes only, this constitutes an escape, even if it be shown that the prisoner actually returned..... 262
3. *Variance*.—Under an indictment against a sheriff for a negligent escape, a conviction may be had on proof of a voluntary escape, because the latter necessarily includes the former..... 262
4. *What constitutes extortion*.—An officer cannot be convicted of extortion, (Code, § 3225,) unless he designedly made charges for services which he knew had not been rendered, or for which he knew that no fees, or fees other than those charged, were allowed; and the fact that, in making out a bill of costs, the aggregate amount of costs charged is less than the full amount which he was entitled to charge, although some illegal items are included, is a strong circumstance to show the absence of the corrupt intent which the law was designed to punish.—*Cleaveland v. The State*..... 254
5. *Statutory provisions regarding extortion*.—Section 3225 of the

## CRIMINAL LAW—CONTINUED.

- Code, defining and fixing the punishment of extortion, contains a typographical error, in the omission of the word *or*, in the fourth line, before the word *other*: the true reading of the section, as shown by the MSS. of the Code, is as follows: "Any justice," &c., "who knowingly takes for services not actually rendered, *or other or* greater fees than are by law allowed," &c. 254
6. *Homicide of slave by white person*.—Under an indictment against a white person for the murder of a slave, (Code, § 3295,) a conviction may be had for manslaughter in the second degree.—*Hudson v. The State*. . . . . 253
7. *General verdict on good and bad counts*.—A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and be sustained. . . . . 253
8. *Waiver of objection to plea*.—In a criminal case, if issue is joined on a plea, and a trial is had thereon, without objection on the part of the State, the appellate court will not, at the instance of the State, treat such plea as a nullity.—*Nonemaker v. The State*. 211
9. *Plea of former conviction*.—Under the plea of former conviction in a gaming case, if the record of the former conviction, and the parol evidence adduced in aid of it, fail to show conclusively the non-identity of the two cases, the court is not authorized to instruct the jury, that if they believe the evidence, they must find the prisoner guilty. . . . . 211
10. *Punishment for concealing or receiving stolen horse*.—Constructing sections 3178 and 3182 of the Code together, a conviction may be had under the former section for concealing, or aiding to conceal, a horse, mare, or other animal specified in the latter section, knowing the same to have been stolen,—the intent to injure or defraud being found; but a conviction for buying or receiving a stolen horse, mare, &c., knowing the same to have been stolen, can only be had under the latter section. The punishment of the former offense, as prescribed by section 3178, is imprisonment in the penitentiary, for not less than two, nor more than five years; of the latter, as prescribed by section 3182, imprisonment in the penitentiary, for not less than three, nor more than seven years.—*Barber v. The State*. . . . . 213
11. *Misjoinder of offenses in indictment*.—Concealing, or aiding to conceal, a stolen horse or mare, knowing the same to have been stolen; and buying, or receiving, a stolen horse or mare, knowing the same to have been stolen,—being offenses which, though of the same character, are not subject to the same punishment, cannot be charged disjunctively in the same count. . . . . 213
12. *Form and sufficiency of indictment for retailing*.—In an indictment under the fourth section of the act of 1856, (Session Acts 1855—6, p. 221.) prohibiting the sale of spirituous liquors within five miles of Greensboro, the name of the person to whom the liquor was sold must be specified, or the person be otherwise



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- described : section 1059 of the Code does not apply to such a case.—*Dorman v. The State*. . . . . 216
13. *Sufficiency of indictment for forgery*.—In an indictment for the forgery of a counterfeit bank-bill, under section 3154 of the Code, it is not necessary to allege that the bank-bill was issued to circulate as money, nor is it necessary to set out the bill according to its tenor.—*Bostick v. The State*. . . . . 266
14. *Statutory provisions*.—Section 3154 of the Code, respecting the forgery of bank-bills, contains a typographical error, in the use of the word *alters* instead of *utters*. . . . . 266
15. *Form of judgment of conviction for assault*.—Under a conviction for an assault and battery, the judgment for the fine assessed should be in the name of the State, for the use of the particular county.—*Warfield v. The State*. . . . . 261
- See, also, BAIL.

CUSTOM.

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DAMAGES.

1. *In detinue*.—In detinue against an executor or administrator, damages may be recovered for his own illegal detention in his representative capacity, and for the previous illegal detention of his testator or intestate.—*English v. McNair*. . . . . 40
2. *Same*.—In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial. *Johnson v. Marshall*. . . . . 521
3. *For breach of special contract*.—In an action for the breach of a written contract, by which defendant agreed to deliver to plaintiff two notes on third persons, or, in the event of his failure to do so, “to make satisfaction within four weeks,” the measure of damages is the value of the notes on the supposition that they were genuine ; and the *onus* of proving their value is on the plaintiff.—*Moore v. Fleming*. . . . . 491
4. *Recoupment*.—In an action to recover the value of work and labor done, the defendant is entitled, under the general issue, (Session Acts 1853-4, p. 60,) to recoup the damages caused by the workman's breach of contract in the performance of the work.—*English v. Wilson*. . . . . 201
5. *Same*.—In an action on the common money counts, to recover money which was taken from plaintiff's possession, when arrested on a charge of having carried off defendant's slave with intent to convert her to his own use, and which was handed to defendant by the agent who made the arrest, the expenses actually incurred by defendant in regaining his slave are not available in recoupment of damages.—*Walker v. McCoy*. . . . . 659

## DEEDS.

1. *Construction of deed of gift.*—A deed of gift, by which certain slaves are conveyed to a trustee, in trust for the grantor's wife during the term of her natural life, "and at her death to descend to her children, if any should survive her; and in case there be no child or children, then said property, or such portion as may be undisposed of, to descend to, and be a part of the estate of the said" grantor,—creates a life estate in the wife, with remainder to her children living at her death.—*Greenwood v. Coleman.* 150
2. *Construction of deed as to clause containing statement of quantity.* Where a deed, after describing the land conveyed partly by its numbers in the government surveys, and partly by metes and bounds, then added the words, "containing seven hundred and two acres, and the same being the settlement of lands at present occupied by said J. H.," the vendor,—*held*, that these words were merely descriptive, and did not amount to a covenant as to quantity.—*Wright v. Wright.*..... 194
3. *Deed of marriage-settlement construed, as to meaning of "heirs of the body," and "natural heirs."*—Where a deed of marriage-settlement, by which the wife's property, real and personal, was conveyed to a trustee for her sole and separate use, contained the further provisions, that if the wife survived her husband, and then died leaving heirs of her body, "the said property shall vest absolutely in such heirs of her body;" and that if the wife died before her husband, "leaving no heirs of her body, then, and in that case, the said property shall vest in and belong to her natural heirs, discharged of all trusts,"—*held*, that heirs of the body, meant children; that the contingent remainder to the natural heirs of the wife was not too remote; and that the rule in *Shelley's* case did not apply, because the wife's estate was equitable, while that of her heirs was legal.—*Shackelford v. Bullock.*.... 418
4. *Validity of deed as affected by duress.*—A marriage-settlement, executed by a widow two days before her intended second marriage, conveying her property in trust for her separate use during life, with remainder to her children, cannot be held to have been obtained by duress on the part of the children, on proof of the grantor's distressed state of mind at the time of its execution, and of threats made by her son against her intended husband, which were not communicated to her; it appearing that her distress, as well as the threats of her son, was caused by the fact that she was then pregnant by her intended husband.—*Anonymous.*..... 430
5. *Validity of secret marriage-settlement.*—A marriage-settlement, secretly executed by a widow two days before her intended second marriage, without the knowledge of her intended husband, conveying her property to her separate use during her life, with remainder to her children, cannot be held fraudulent as against the husband's marital rights, in a controversy between him and the children, when it appears that, at the time

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- the settlement was executed, the widow was pregnant by her intended husband..... 430
6. *Validity of voluntary conveyance of slaves belonging to wife's separate estate.*—If a married woman, owning a separate estate created by a parol gift of slaves, restores them to her grantor, and then accepts from him a deed, conveying them to her for life, to her sole and separate use, with remainder to her children, her husband's creditors cannot successfully impeach the deed for fraud, although the transaction was intended by the parties to defeat the supposed rights of such creditors.—*Paulk v. Wolfe, Gillespie & Co.*..... 541
7. *Validity of mortgage.*—A mortgage, given for the indemnity of a surety, is not rendered fraudulent and void on its face as to creditors, by the insertion of a clause conferring on the mortgagee a discretionary power of sale for his own protection; nor by a recital that sundry judgments have already acquired a lien on the property, which the mortgagor has no desire to avoid; nor by a reservation to the mortgagor of the property exempt from levy and sale under execution at law.—*Walthall v. Rives, Battle & Co.*..... 91
8. *Validity of fraudulent deed as between parties.*—A voluntary conveyance, made with intent to hinder and defraud the grantor's creditors, is nevertheless valid and binding as between the parties; and the grantor cannot set up the fraud in avoidance of it.—*Greenwood v. Coleman.*..... 150
9. *Validity of unrecorded mortgage.*—An unrecorded mortgage is valid and operative, notwithstanding the want of registration, as against a plaintiff in execution who had actual notice of it before he acquired a lien.—*Wyatt v. Stewart.*..... 716
10. *Conveyance of wife's separate estate under act of 1850.*—If a married woman, while yet an infant, joins with her husband in a conveyance of her separate statutory estate under the act of 1850, (Session Acts 1849-50, p. 63,) the deed is voidable as to her; and a bill in equity, filed within a reasonable time after attaining her majority, is an appropriate mode of avoiding it. *Greenwood v. Coleman.*..... 150
11. *Statute of uses and trusts construed.*—Section 1306 of the Code converts all titles and interests in lands into legal estates in the beneficiary, to the same extent as if the conveyance had been made directly to him, where the nominal title is vested in a naked trustee, who is not placed in possession, nor required to perform any duties, and where the instrument creating such nominal title declares a use, trust, or confidence for another; but it has no application to a conveyance, which, although it may declare a trust for the use of the grantor or of another person, charges the trustee with the control, management, or other active duties in regard to the trust property; nor does it



## DEEDS—CONTINUED.

apply to a conveyance of land, taken by a father in the name of his son, which recites that the purchase-money was paid by the father.—*You v. Flinn*..... 409

## DEPOSITION.

1. *Motion to suppress on account of insufficiency of answers to cross interrogatories*.—A deposition will not be suppressed, "on the ground that the witness has not answered fully and fairly the cross interrogatories," when all the questions appear to have received a substantial answer, and nothing is shown which would justify the conclusion that the witness was seeking to evade a disclosure of facts within his knowledge, or of his professional opinions.—*Buckley v. Cunningham*..... 69
2. *Motion to suppress on account of defects in commission*.—In an action against an administrator, in his official capacity, it is not a good ground for suppressing a deposition, that the commission describes him as "administrator, &c.," without adding the name of his intestate : such defects in the commission may be supplied by reference to the other papers in the cause.—*Buckner v. Stewart*..... 529
3. *Sufficiency of commissioner's certificate*.—When the certificate of the commissioner, appended to a deposition, (Code, §§ 2322–23,) states that the testimony of the witness was taken down under oath, and subscribed by the witness, in his presence, at the time and place named ; and that he has personal knowledge of the witness,—this is a substantial compliance with the provisions of the statute.—*Stetson v. Lyons*..... 140
4. *Same*.—Under the provisions of the Code, ( §§ 2322–23,) the failure of the commissioner to certify that he has personal knowledge of the identity of the witness, or that proof of such identity was made before him, is good cause for the suppression of the deposition.—*Farrelly v. Maria Louisa*..... 284
5. *When motion to suppress may or must be made*.—It may admit of question whether a party may not at any time move to suppress a portion of a deposition, on account of objections which go to the substance of the evidence, unless his failure to object to the interrogatory, to which it is responsive, is a waiver of the objection.—*Walker v. Walker*..... 469
6. *Same*.—An objection to a portion of a deposition, on the ground that it is not responsive to the interrogatory, cannot be made for the first time on the trial, unless accompanied by proof that it could not have been made at an earlier opportunity.—*Saltmarsh v. Bower & Co*..... 613
7. *Specific objection*.—A motion to suppress a deposition, on a specified ground, is an implied waiver of all other grounds of objection ; and the party will be confined in the appellate court to the specified objection..... 613
8. *General objection*.—A general objection to a deposition as evi-

DEPOSITION—CONTINUED.

- dence, not assigning any particular reason, nor specifying any particular point, may be overruled entirely, if any part of the deposition is legal evidence.—*Saltmarsh v. Bower & Co.*..... 613
9. *Re-examination of party as witness.*—When the deposition of the nominal plaintiff has been taken, at the instance of the defendant, on interrogatories and cross-interrogatories, it may be re-taken by the beneficial plaintiff under the act of 1856, (Session Acts 1855-6, p. 28,) on making the prescribed affidavit; and it is no objection to the second deposition, that the commission does not state that it is to operate by way of re-examination or cross-examination..... 613

DETINUE.

1. *Damages.*—In detinue against an executor or administrator, damages may be recovered for his own illegal detention in his representative capacity, and for the previous illegal detention of his testator or intestate.—*English v. McNair*..... 40
2. *Same.*—In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial. *Johnson v. Marshall*..... 521
3. *Form of verdict and judgment for defendant in detinue.*—If the plaintiff in detinue fails to give the bond and affidavit necessary for obtaining the possession of the property sued for, but leaves it in the undisturbed possession of the defendant, he cannot complain on error that the jury, in returning a verdict for the defendant, did not assess the value of the property; nor that the court, in giving judgment for the defendant, did not render judgment for the property or its alternate value, with damages for its detention: section 2194 of the Code is not applicable in such case.—*Lucas v. Daniels*..... 188
4. *When outstanding title may be set up as defense.*—In detinue by the surviving husband, against one of his sons-in-law, the defendant may set up an outstanding title in a trustee, to whom the slave was conveyed in trust for the plaintiff's deceased wife for life, with remainder to their children; and this, notwithstanding the possession was obtained from plaintiff by stealth or violence..... 188

DIVORCE.

1. *When decree of divorce may be impeached for fraud.*—A decree of divorce, rendered by a chancery court in this State, may be impeached for fraud, by a bill filed for that purpose, before it has been ratified by the legislature.—*Ex parte Smith*..... 455
2. *Jurisdiction of chancellor to decree alimony to wife pending suit for divorce.*—Independent of its statutory powers to make an allowance for the support of the wife pending a suit for divorce, (Code, § 1970,) the chancery court has original jurisdiction to make an order for such allowance to the wife, pending a suit by

## DIVORCE—CONTINUED.

- her to impeach for fraud a decree of divorce in favor of her husband.—*Ex parte Smith*..... 455
3. *Jurisdiction of chancellor over custody of children*.—Section 2006 of the Code, unlike the act of 1833, (Clay's Digest, 171, § 20.) gives the chancellor jurisdiction of the custody and control of children, as between husband and wife, only in cases of voluntary separation.—*Bryan v. Bryan*..... 516
4. *What constitutes voluntary separation*.—A separation between husband and wife, to be *voluntary* within the meaning of the statute, (Code, § 2006,) must be by mutual consent: a voluntary abandonment of the husband by the wife, against his wishes and consent, and for causes which in law do not justify such abandonment, does not constitute a voluntary separation between them..... 516
5. *What conduct of husband justifies abandonment by wife*.—Mere grossness of language on the part of the husband, rudeness of manners, and disrespectful bearing towards his wife, do not constitute a legal justification of her abandonment of him..... 516
6. *Intemperate habits of husband as cause for removing custody of children*.—Proof of the fact that the husband was in the habit of drinking freely, and, in a few instances, to intoxication, is not sufficient to authorize the chancellor, on the application of the wife, to take away from him the custody of their children, when it is not shown that his drinking disqualifies him for business, or materially interferes with his business habits, or makes his association dangerous to his wife and children, or pernicious to the latter.. ..... 516

## EASEMENT.

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## EJECTMENT.

1. *When purchaser at sheriff's sale may maintain real action*.—A purchaser of land at sheriff's sale does not obtain such a title as will support a real action in the nature of an ejectment, when it appears that the defendant in execution, although he had himself paid the purchase-money, took the conveyance in the name of his son.—*You v. Flinn*..... 409
2. *Revivor of action by tenant for life*.—If tenant for life bring a real action in nature of ejectment, and die pending the suit, the action cannot, either at common law, or under section 2158 of the Code, be revived in the name of the remainder-man, but can only be revived in the name of the personal representative of the deceased tenant for life.—*Mason v. Storrs*..... 179

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## ERROR AND APPEAL.

## I. WHEN APPEAL LIES.

1. *From decree in chancery*.—An appeal does not lie from a decree in chancery, dismissing a cross bill, and continuing the original cause.—*Parish's Adm'r v. Galloway*. . . . . 163
2. *To what term returnable*.—An appeal should be taken to the first ensuing term of the supreme court, (Code, § § 3018, 3022,) although the intervening period may be less than ten days; and if taken to the second ensuing term, it will be dismissed on motion.—*Willingham v. Harrell*. . . . . 680

## II. BOND, AND SECURITY FOR COSTS.

3. *Sufficiency of appeal bond*.—An appeal bond, conditioned that, "if said judgment should be affirmed," and the appellant should pay the appellee "the damages and costs he may sustain by said appeal," then said bond to be void, &c., is not a sufficient security for the costs of the appeal.—*Barnett v. The State*. . . . . 260
4. *Same*.—A penal bond, conditioned that the appellant "shall prosecute his said appeal to effect, and shall satisfy such judgment as the supreme court shall render in the premises," is a sufficient security for the costs of the appeal, (Code, § 3041,) when the amount of the penalty is large enough to cover all the costs of the appeal, although the judgment or decree appealed from is one which cannot be superseded.—*Walker v. Hunter* . . . . . 204
5. *Judicial notice of costs of appeal*.—The appellate court will take judicial notice of the amount of the costs of the appeal in each given case, and whether the penalty of the appeal bond is sufficient to cover all the costs.—*Walker v. Hunter*. . . . . 204
6. *Discharge of sureties on appeal bond by agreement between parties to appeal*.—An agreement between the parties to an appeal pending in the supreme court, entered into without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified amount, at the costs of the appellant, and that the property in controversy should belong to him, discharges the sureties from liability on their bond.—*Johnson v. Flint*. . . . . 673

## III. LIMITATION.

7. *Appeal from probate decree*.—Five days is the limitation of an appeal from an order of the probate court removing an executor on account of his failure to give bond when required, (Code, § 1888;) and if an appeal is taken after the expiration of that time, the appellate court will dismiss it *ex mero motu*, without any objection on the part of the appellee.—*Holtzclaw v. Ware*. 307

## IV. PARTIES.

8. *Appeal by feme covert*.—In an action brought by a feme sole, judgment being rendered against her after her marriage has been sug-

## ERROR AND APPEAL—CONTINUED.

- gested and entered of record, an appeal, sued out in her former name, will be dismissed on motion, although she is described by that name in the marginal statement of the parties prefixed to the judgment entry.—*Lamkin v. Dudley*..... 116
9. *Appeal by commissioners' court*.—When the proceedings of the commissioners' court, in the matter of the establishment or change of a public road, are removed by *certiorari* to the circuit court, and there reversed, an appeal to the supreme court may be prosecuted in the name of the commissioners' court.—*Commissioners' Court v. Bowie*..... 461

## V. PRACTICE.

10. *Amendment of judgment nunc pro tunc pending appeal*.—When a judgment is amended *nunc pro tunc*, after an appeal has been sued out, but before the transcript has been returned to the appellate court, the amended judgment may be incorporated by the clerk in the transcript without a *certiorari*..... 114
11. *What is revisable on error*.—The action of the circuit court, in striking out a plea in abatement as frivolous, cannot be revised on error, when no objection or exception was reserved to it. *Mahoney v. O'Leary*..... 97
12. *When decision of commissioners' court is revisable*.—In determining the expediency of a proposed establishment or change of a public road, the commissioners' court exercises a *quasi*-legislative authority, and does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the county, the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair; and its decision on the question of expediency is not revisable in an appellate court.—*Comm'rs' Court v. Bowie*..... 461
13. *Waiver of error in sustaining demurrer to complaint*.—If the plaintiff amends his complaint, after demurrer sustained to the original, and proceeds to trial on it as amended, he thereby waives his right to review on error the ruling of the court sustaining the demurrer.—*Sheppard v. Shelton*..... 652
14. *Error without injury in rulings on pleadings*.—The sustaining of a demurrer to a special plea, when the defendant had the benefit of the same facts under the general issue, is, at most, error without injury.—*Rodgers v. Brazeale*..... 512
15. *Premature commencement of action*.—The premature commencement of an action, when not objected to in the court below, is not available on error, (Code, § 2405,) if the complaint contains a substantial cause of action.—*Mahoney v. O'Leary*..... 97
16. *Presumption in favor of ruling of primary court*.—Where the bill of exceptions, professing to set out all the evidence, does not show that the defendant was proved to be a white person,

ERROR AND APPEAL—CONTINUED.

- but affirmatively shows that he was not a slave, the appellate court cannot, for the purpose of curing an error in the admission of a person of mixed blood as a witness, presume that the defendant also was a person of mixed blood.—*Heath v. The State*..... 250
17. *Presumption of injury from error*.—Where the complaint contains a count on a guaranty of a promissory note, a count on a promise to pay in consideration of forbearance granted to another, and a count on an account; and a demurrer is erroneously sustained to the first count,—the appellate court will presume injury from the error, and will reverse and remand at the instance of the plaintiff, although the written guaranty offered in evidence by him, under the other counts, is void on its face under the statute of frauds.—*Rigby v. Norwood*..... 129
18. *Same*.—In an action brought by a feme sole, whose marriage is suggested pending the suit, (Code, § 2150,) the insertion of her former name in the marginal statement of the parties in the judgment entry, being an error apparent on the record, and amendable by the record, (Code, §§ 2402, 2404,) will be regarded by the appellate court as amended.—*Lamkin v. Dudley*.... 116
19. *Amendment after judgment by default, of insufficient description of parties' names in complaint*.—After judgment by default, in an action by a partnership, the failure to state the individual names of the partners in the complaint, when they are fully stated in the accompanying summons, is an error which, being amendable in the primary court, will be considered amended on error. *Gaillard v. Dubose & Co*..... 207
20. *Amendment of clerical misprision*.—A clerical misprision in entering up a judgment, which might have been corrected on motion in the primary court, furnishes no cause for a reversal of the judgment, (Code, § 2401,) unless the primary court refused to correct it on motion.—*Warfield v. The State*..... 261
21. *Conclusiveness of judicial decision*.—A decision of the supreme court is the law of the case in which it was pronounced, and is conclusive, both in the primary court, and on a second appeal. *Thomason v. Dill*..... 175
22. *Conclusiveness of settled rule of property*. A decision of the supreme court, which has probably become a rule of property, should be adhered to by the courts, even where its correctness might be doubted if the question were *res integra*.—*Bennett v. Bennett*..... 53
23. *Authority of foreign adjudged cases*.—Where the statutes of another State, but not the decisions of its courts construing those statutes, are offered in evidence in the courts of this State, our courts will consult those decisions to aid them in arriving at correct conclusions as to the construction of such foreign statutes, but will not regard them as binding and authoritative expositions of those statutes.—*Nelson v. Goree's Adm'r*, 565



## ERROR AND APPEAL—CONTINUED.

## VI. JUDGMENT.

24. *Remandment of cause, on reversal, for amendment of bill.*—When an objection to the equity of a bill, founded on the want of a necessary allegation, is overruled by the chancellor, and his decision on that point is reversed on error, the appellate court will remand the cause, in order that the complainant may apply for leave to amend his bill.—*Walthall v. Rives, Battle & Co.* . . . 91
25. *Same.*—When a material defect in the bill, to which the attention of the chancellor was not called, is noticed for the first time in the appellate court, on errors assigned by the defendant, the cause will be remanded.—*Kelly's Heirs v. Allen* . . . . . 663

## ESTATES OF DECEDENTS.

See CHANCERY, 6.

## ESTOPPEL.

1. *Against administrator by illegal bailment.*—If an administrator makes an illegal bailment of property belonging to his intestate's estate, he is estopped from setting up a title in avoidance of it; but this principle does not prohibit him from recovering the property by suit after the termination of the bailment according to its terms.—*English v. McNair* . . . . . 40
2. *Against purchaser from alleging insufficiency of vendor's title.*—The mere failure of the purchaser to object to the sufficiency of a deed, when informed by his vendor that the deed was ready for delivery on the appointed day, does not estop him from afterwards insisting that the vendor was unable to comply with all the stipulations of his contract, when it is not shown that he ever saw the deed.—*McKleroy v. Tulane* . . . . . 78
3. *Against mortgagee from buying property under older lien.*—The acceptance of a mortgage does not estop the mortgagee from purchasing the mortgaged property under judgments having a lien paramount to that of the mortgage.—*Walthall v. Rives, Battle & Co.* . . . . . 91
4. *Against tenant by acknowledgment of title in another.*—A purchaser of land, who is in possession under a bond for titles executed by his vendor, and who afterwards acknowledges the validity of a third person's title, obtained by contract with his vendor, and consummated by patent from the United States, is not thereby estopped from setting up his own equitable title against such third person, when it appears that his acknowledgment was made under a misapprehension as to the conclusiveness of the patent against his superior equity.—*Pearce v. Nix* . . . . . 183
5. *Against heirs-at-law and devisees.*—The receipt by the heirs-at-law and devisees of their respective portions of the purchase-money, arising from an unauthorized sale of land by the executor, does not estop them from recovering the land in an action

ESTOPPEL—CONTINUED.

- at law : if available at all as an estoppel, it is only in equity.  
 Walker's Heirs v. Murphy..... 591
6. *Against making defense to note.*—If the maker of a note, given for the purchase-money of land, substitutes a new note in its stead, without any new consideration, to a mere voluntary assignee of the vendor, this does not estop him from defending against the new note on account of his vendor's misrepresentations as to the boundaries of the land.—Kelly's Heirs v. Allen.. 663
7. *Against sheriff.*—Although the sheriff may, generally, refuse to deliver the property to the purchaser until the purchase-money is paid or tendered ; yet, if he makes it on of the conditions of the sale, when selling partnership effects under execution against one of the partners individually, that he will make actual delivery of the goods to the purchaser, he cannot, in an action brought by him to recover the purchase-money, be heard to insist that he had no authority, as sheriff, to make such stipulation.—Andrews v. Keith..... 721

ESTRAYS.

1. *Rights of taker-up.*—Under the provisions of the Code, (§§ 1062–92,) the taker-up of an estray may place the animal in the possession of another person, to be kept for him ; and the escape of the animal before the expiration of twelve months does not affect the title which the law confers on the taker-up at the expiration of that period.—Hudgins v. Glass..... 110

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence to prove damages sustained.*—In an action to recover damages for the wrongful and malicious suing out of an attachment against a merchant, the plaintiff cannot be allowed to prove " what was the usual profit made by such establishments in the neighborhood of the plaintiff in the same kind of business."—O'Grady v. Julian..... 88
2. *In trespass.*—In trespass against several, any evidence which shows title in one of them, under whom the others acted, is relevant and admissible for the defendants ; and any evidence which tends to disprove such title, is competent for the plaintiff in rebuttal.—Tarry v. Brown..... 159
3. *In statutory suit for freedom.*—In this action, (Code, § 2049,) the fact that the petitioner's mother, before and about the time of his birth, went at large, was treated and dealt with as a free person, was not under the control of any other person, and conducted herself as a free person, is competent evidence for the petitioner.—Farrelly v. Maria Louisa..... 284
4. *On question of negligence.*—Where the question at issue is, whether or not a carrier by water was guilty of negligence in the transportation of freight, the fact that he communicated by

## EVIDENCE—CONTINUED.

- telegraph with a point above on the river, after his boat had stranded, for the purpose of ascertaining the stage of water at that point, may be relevant evidence for him; consequently, if such evidence is admitted by the primary court, its ruling will be affirmed on error, unless the bill of exceptions negatives the existence of any circumstances which would render the evidence admissible.—*Johnson v. Lightsey*..... 169
5. *Same*.—In such action, a delay by the carrier having been shown, from which injury might have resulted, he may show that, before the commencement of the voyage, the plaintiff consented that such delay should occur; the maxim applies, *volenti non fit injuria*..... 169
6. *Same*.—It having been shown that the carrier, at the time of the accident which caused the injury complained of, was descending the river with two flat-boats lashed together, he may show that flat-boats were frequently carried down the river in that manner, and that it was a customary mode of navigating the river..... 169
7. *Relevancy of evidence affecting question whether contract of partner is binding on partnership*.—It being a material question, whether certain acceptances in the name of a firm were binding on the partnership, or were the act of one partner individually, without the knowledge or consent of his co-partner, and for a consideration outside the scope of the partnership business, evidence showing the nature and character of the general business in which the partnership was engaged is relevant and admissible.—*Saltmarsh v. Bower & Co*..... 613
8. *Relevancy of evidence as tending to prove nature of one's business*. Where the question at issue is, whether a person was engaged in the business of a private banker and exchange-broker, or was acting as a bank-agent, the relevancy of the fact that, as an abstract and general proposition, the former business is more profitable than the latter, "is, to say the least of it, open to grave question."—*Storey v. Union Bank*..... 687

## II. ADMISSIONS, DECLARATIONS, HEARSAY, RES GESTÆ.

9. *Declarations of partner admissible against partnership*.—The declarations or admissions of one partner, in the course of the partnership business, tending to show a recognition by the partnership of the firm name by which it is sued, are admissible evidence against the partnership.—*Jemison, Ficklin & Co. v. Minor & Bizzell*..... 33
10. *Admissibility of assignor's declarations as evidence against assignee*. The admissions or declarations of the vendor, as to the payment of the purchase-money by the purchaser, are competent evidence against one to whom he afterwards conveys the land, in a suit instituted against them jointly by the purchaser to compel a conveyance of the title.—*Pearce v. Nix*..... 183



## EVIDENCE—CONTINUED.

11. *Admissibility of agent's declarations as evidence against principal.*  
The declarations of an agent, in the performance of an illegal act not expressly authorized by his principal, are not competent evidence against the latter when sought to be charged in a criminal proceeding.—*Nall v. The State*..... 262
12. *Admissibility of declarations as affecting validity of deed.*—Where the validity of a marriage-settlement is in controversy, in a suit between the surviving husband and his wife's children by a former marriage, the declarations of the husband and wife, made after the execution of the settlement, are not competent evidence against the children.—*Anonymous*..... 430
13. *Admissibility of declarations as part of res gestæ.*—Where the claimant derives title to the slave in controversy under a purchase from the defendant in execution, their declarations respecting the contract, whether made before or after its consummation, but not constituting a part of the *res gestæ*, are not competent evidence for the claimant.—*McAdams v. Beard & Henderson*..... 478
14. *Attorney's authority to make admissions.*—Held, on the authority of *Rosenbaum's case*, 33 Ala. 354, that there was no error in the refusal of the primary court to suppress an admission of record made by the defendant's former attorney, on the affidavit of the defendant himself that he "supposed said admission was inadvertently made."—*Saltmarsh v. Bower & Co.*..... 613
15. *Hearsay inadmissible.*—A witness cannot be allowed to testify, that a certain fact existed, as he *understood* at the time.—*Buckley v. Cunningham*..... 69

## III. BURDEN, AND WEIGHT.

16. *Onus of proof as to payment.*—In appeal cases from a justice's court, where the sum in controversy exceeds \$20, if the defendant testifies to the fact of payment in support of his plea, and his testimony is contradicted by the plaintiff, (Code, § 2779,) the *onus* is on the defendant to prove the payment: the rule established by the case of *Jordan v. Owen*, 27 Ala. 152, as applicable to cases in which the plaintiff seeks to establish the correctness of his demand by his own oath, (Code, § 2313,) does not apply to such appeal cases.—*McLendon & Robinson v. Hamblin*..... 86
17. *Same, as to probable cause for suing out attachment.*—On an action to recover damages for the wrongful and malicious suing out of an attachment, the *onus* is on the plaintiff to prove the falsity of the affidavit on which the attachment was sued out, and not on the defendant to prove its truth.—*O'Grady v. Julian*..... 88
18. *In action for breach of contract.*—In an action for the breach of a written contract, by which defendant agreed to deliver to plaintiff two notes on third persons, or, in the event of his failure to do so, "to make satisfaction within four weeks," the measure

## EVIDENCE—CONTINUED.

of damages is the value of the notes on the supposition that they were genuine; and the *onus* of proving their value is on the plaintiff.—*Moore v. Fleming*..... 491

## IV. MATTERS JUDICIALLY KNOWN.

19. *Costs of appeal*.—The appellate court will take judicial notice of the amount of the costs of the appeal in each given case, and whether the penalty of the appeal bond is sufficient to cover all the costs.—*Walker v. Hunter*..... 204

## V. OBJECTIONS.

20. *General objection*.—A general objection to evidence, of which a portion is legal, may be overruled entirely.—*Walker v. Walker's Executors*..... 469  
*Also, Saltmarsh v. Bower & Co.*..... 613
21. *Specific objection*.—An objection to the admissibility of evidence on a specified ground is an implied waiver of all other grounds of objection.—*Saltmarsh v. Bower & Co.*..... 613
22. *Offer of evidence for specified purposes*.—When evidence is offered for several specified purposes, for some of which it is inadmissible, the court may exclude it altogether.—*Johnson v. Marshall*..... 522

## VI. OPINION, AND LEGAL CONCLUSION.

23. *Mode of proving opinion of physician*.—A physician cannot be allowed to state, that, after making a professional visit to the slave whose soundness is in controversy, he expressed the opinion to plaintiff that the slave must have been unsound when purchased by him.—*Buckley v. Cunningham*..... 69
24. *Mode of proving damages*.—A witness may be asked to state, from his own knowledge, "what was the effect of the issue of said attachment, and the seizure and levy under the same, upon the business and credit of the plaintiff."—*O'Grady v. Julian*.. 88
25. *Opinion of witness on question of sanity*.—A subscribing witness to a will may give his opinion as to the mental condition of the testator at the time of its execution.—*Walker v. Walker's Executor*... 469
26. *Opinion of witness as expert*.—A witness cannot be allowed to testify, as an expert, to the abstract proposition, that it is more profitable to discount mercantile paper on private account, with borrowed money, than to act as a bank-agent.—*Storey v. Union Bank*..... 687
27. *To what witness may testify*.—A witness cannot, even though he be a physician, be allowed to testify that the testator "had sufficient capacity to make a will."—*Walker v. Walker*..... 469
28. *When witness may testify to opinion or conclusion*.—A witness cannot be allowed to state, in reference to an advance of money,

## EVIDENCE—CONTINUED.

- that he "did not *consider* that this was a loan."—*Saltmarsh v. Bower & Co.* ..... 613
29. *Same.*—Where a witness used this language, "It was *understood* between B. and myself, and was agreed on before the failure of B. & Co., to dispose of the claim in this way, and, *as we thought*, to the satisfaction of all parties concerned,"—*held*, that the word *understood*, being evidently used as the synonym of *agreed*, was not objectionable as the expression of an opinion by the witness; and consequently, that an objection to the entire answer might be overruled, although the latter portion of it was not admissible evidence..... 613

## VII. PAROL AND WRITTEN.

30. *Admissibility of parol evidence to vary or contradict writing.* The rule which forbids the admission of parol evidence, to add to, vary or contradict a written instrument, does not apply where the rescission of a contract is sought in equity on the ground of fraud.—*Pierce v. Wilson*..... 596
31. *Admissibility of parol evidence to explain receipt.*—In an action for contribution between sureties, the plaintiff having taken a written assignment of the judgment paid by him, expressing therein the receipt of the money paid, parol evidence is admissible to show that the judgment, which was described as having been rendered by the *circuit* court, was in fact rendered by the *county* court.—*Stallworth v. Preslar*..... 505
32. *Conclusiveness of sheriff's return.*—The sheriff's return on an execution, showing who was the purchaser at his sale, is not conclusive on the real purchaser.—*Wyatt v. Stewart*..... 716

## VIII. PARTIES.

33. *Examination of parties as witnesses.*—When the plaintiff seeks to establish the correctness of his demand by his own oath, (Code, § 2313,) and is cross-examined concerning his testimony on a former trial relative to the cross demand set up as a defense, the defendant has no right to impeach him by contradicting his testimony as to such former statements.—*Flash, Hartwell & Co. v. Ferri*..... 186
34. *Same.*—The plaintiff having been examined as a witness in his own behalf, (Code, § 2313,) the defendant cannot complain on error that the court rejected a portion of his testimony in reply, unless the record affirmatively shows that the portion rejected by the court was a denial of some fact sworn to by the plaintiff. *English v. Wilson*..... 201
35. *Re-examination.*—When the deposition of the nominal plaintiff has been taken, at the instance of the defendant, on interrogatories and cross-interrogatories, it may be re-taken by the beneficial plaintiff under the act of 1856, (Session Acts 1855-6, p. 28,) on making the prescribed affidavit; and it is no objection



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- to the second deposition, that the commission does not state that it is to operate by way of re-examination or cross-examination.—*Salmarsh v. Bower & Co.*..... 613
36. *Onus of proof.*—In appeal cases from a justice's court, where the sum in controversy exceeds \$20, if the defendant testifies to the fact of payment in support of his plea, and his testimony is contradicted by the plaintiff, (Code, § 2779,) the *onus* is on the defendant to prove the payment; the rule established by the case of *Jordan v. Owen*, 27 Ala. 152, as applicable to cases in which the plaintiff seeks to establish the correctness of his demand by his own oath, (Code, § 2313,) does not apply to such appeal cases.—*McLendon & Robinson v. Hamblin*..... 86

## IX. PRIMARY AND SECONDARY.

37. *Production of papers on notice.*—Under a notice to plaintiff to produce "the books and papers in his possession containing all the business transactions had between him and the defendant relative to the subject-matter of the suit," certain books, papers and letters having been produced, "all which were subject to the inspection and use of the defendant, and witnesses were examined as to some of said books as evidence,"—the defendant is not entitled to read one of the letters in evidence, without proof of handwriting.—*Stetson v. Lyons*..... 140

## X. RECORDS AND JUDGMENTS.

38. *Admissibility of record as evidence.*—In detinue for a slave, the record of a chancery suit, in which the plaintiff's vendor was complainant, and third persons were defendants, is not admissible evidence against the plaintiff, to show that, after the sale to him, his vendor also sold the slave to the defendants in that suit.—*Johnson v. Marshall*..... 522
39. *Conclusiveness and effect as evidence of interlocutory probate decree.* In a proceeding before the probate court for the settlement of a guardian's accounts, the auditing and stating of the account by the judge, by which a balance is ascertained against the guardian, is but the interlocutory ascertainment of a fact preliminary to a decree, and is not evidence against the ward, in a subsequent chancery suit, when it appears that, before the rendition of a final decree, the proceeding was voluntarily dismissed at his instance.—*Capell v. Landano*..... 135
40. *Conclusiveness of judgment.*—Where a petition for the *supersedeas* of an execution is filed by one of the defendants in the judgment, who was the surety of his co-defendant, setting up a contract between his co-defendant and the plaintiff, to the effect that an account held by the former on the latter, equal to the amount due on the judgment, should be credited on the judgment,—the judgment of the court, dismissing the *supersedeas*, is conclusive on the petitioner, in a subsequent action on the

EVIDENCE—CONTINUED.

- account, as to the making of the alleged contract, but is not *prima facie* conclusive against the correctness of the account. *Saltmarsh v. Bower & Co.*..... 613
41. *Effect of recitals of record as evidence.*—When a transcript, showing the proceedings had on a petition for the *supersedeas* of an execution, is offered in evidence in a subsequent suit, the petition for the *supersedeas*, though admissible in evidence as a part of the record, is not competent evidence of the facts stated in it..... 613
42. *Conclusiveness of sheriff's return.*—The sheriff's return on an execution, showing who was the purchaser at his sale, is not conclusive on the real purchaser.—*Wyatt v. Stewart.*..... 716

XI. SUBSTANCE OF ISSUE, AND VARIANCE.

43. *Escape.*—Under an indictment against a sheriff for a negligent escape, a conviction may be had on proof of a voluntary escape, because the latter necessarily includes the former. *Nall v. The State.*..... 262
44. *Homicide of slave by white person.*—Under an indictment against a white person for the murder of a slave, (Code, § 3295,) a conviction may be had for manslaughter in the second degree.—*Hudson v. The State.*..... 253

EXECUTION.

1. *Place of selling property under execution.*—In an action on a sheriff's official bond, against him and his sureties, to recover damages for his wrongful act in selling cattle under execution at a place not authorized by law, (Code, § 2446,) a plea in bar, averring that the place where the cattle were sold was "a place in the neighborhood where they were levied on, and the most convenient place thereto at which they could be sold for the best price," presents a full defense to the action.—*Sheppard v. Shelton.*..... 652
2. *Levy of fi. fa. against partner individually on partnership effects.* It is settled in this State, that a sheriff, having in his hands an execution against one member of a partnership, may levy it on that partner's undivided interest in the partnership effects, and, for his own protection, may take the goods into his exclusive possession.—*Andrews v. Keith.*..... 722
3. *Rights of purchaser at sheriff's sale.*—A purchaser at sheriff's sale under execution, of the interest of one of several partners, does not acquire a right to the exclusive possession of the partnership effects, but only becomes a tenant in common with the other partners; and the effects are still liable to the partnership debts, to the same extent as before the sale..... 722
4. *Delivery of possession to purchaser.*—Although the sheriff may, generally, refuse to deliver the property to the purchaser until the purchase-money is paid or tendered; yet, if he makes it

## EXECUTION—CONTINUED.

- one of the conditions of the sale, when selling partnership effects under execution against one of the partners individually, that he will make actual delivery of the goods to the purchaser, he cannot, in an action brought by him to recover the purchase-money, be heard to insist that he had no authority, as sheriff, to make such stipulation..... 722
5. *When purchaser at sheriff's sale may maintain real action.*—A purchaser of land at sheriff's sale does not obtain such a title as will support a real action in the nature of an ejectment, when it appears that the defendant in execution, although he had himself paid the purchase-money, took the conveyance in the name of his son.—*You v. Flinn*..... 409

## EXECUTORS AND ADMINISTRATORS.

1. *To whom administration may be granted.*—The fact that an applicant for letters of administration has, without authority, intermeddled with the intestate's effects, and disposed of some of the property belonging to the estate, does not, *per se*, disqualify him for the office of administrator, (Code, §§ 1658, 1668,) nor render his appointment irregular.—*Bingham v. Crenshaw*..... 683
2. *Implied waiver of right of administration.*—The failure of the widow to apply for letters of administration on the estate of her deceased husband, before the expiration of forty days after his death became known, is an implied waiver of her right to the administration, (Code, §§ 1668–69;) and the pendency of another administration, improvidently granted before the expiration of the forty days, does not excuse her failure, nor relieve her from its consequences.—*Curtis v. Burt*..... 729
3. *Same.*—The largest creditor of the estate, having perfected his right to the administration, by filing his application, within the time prescribed by the statute, (Code, §§ 1668–69,) asking the grant of administration to himself, and the revocation of letters improvidently granted to another, cannot be held to have abandoned the right, by subsequently filing another petition, asking the revocation of letters granted to the widow, without notice to him, on the resignation of the administrator whose removal he asked in his first petition..... 729
4. *Validity of grant of administration to feme covert.*—Under the statutes of this State, (Code, §§ 1660, 1673, 1683,) as at common law, administration may be granted to a married woman, if her husband consent to her appointment; and when the validity of her administration is collaterally assailed, her husband's consent will be presumed.—*English v. McNair*..... 40
5. *Validity of grant of administration on estate of non-resident testator.*—A grant of general letters of administration, by a probate court of this State, on the estate of a non-resident decedent, who died in the State of his residence, leaving a valid last will and testament, and owning property here in the county in which



EXECUTORS AND ADMINISTRATORS—CONTINUED.

- such letters of administration were granted, (Code, §§ 670, 1621, 1630, 1664-67,) though irregular and voidable, cannot be held void when collaterally attacked.—*Broughton v. Bradley*..... 694
6. *For what fraud grant of administration may be collaterally impeached.*—A grant of general letters of administration, by a probate court in this State, on the estate of a foreign decedent, who, dying in the State of his residence, left assets here in the county in which such letters of administration were granted, cannot be collaterally impeached for fraud, in an action brought against such administrator by the decedent's foreign executor, on proof that the action was pending when the administrator applied for the grant of letters to himself, that he failed to state the fact of the existence of a will, and that he misrepresented the value of the assets in the county..... 694
7. *Revocation of letters of administration.*—General letters of administration, granted by a probate court in this State, on the estate of a foreign decedent, who had effects in the county in which such appointment was made, may be revoked on the application of the decedent's foreign executor, (Code, §§ 1696-97,) on proof that the decedent left a valid will, which had been admitted to probate in the foreign State in which he lived and died; and that such administrator, pending an action against him by the foreign executor, procured the grant of administration to himself by false and fraudulent representations..... 694
8. *Action by foreign executor defeated by domestic grant of administration to defendant.*—In an action brought by a foreign executor, who has complied with all the requisitions of the statute, (Code, § 1934,) *plea puis darrein continuance*, setting up the grant of letters of administration to the defendant, after the commencement of the suit, by a probate court of this State which had jurisdiction of the subject-matter, presents a good defense to the further maintenance of the action..... 694
9. *Executor's power under will to sell realty.*—Where a testator directed that his entire estate, after the payment of his debts, should be kept together "for the support, maintenance and education" of his children; that no account or charge should be made against any of them for necessary support and education; that when either of his daughters became of age or married, she should have one-sixth part of the estate "converted into slaves, and settled upon her, to her sole and separate use;" and that as his sons severally became of age, their portions of the estate should "be paid to them in cash,"—*held*, that the executor had no power under the will to sell the entire real estate at private sale, although two of the children were in a condition at the same time to demand the payment of their respective shares.—*Walker's Heirs v. Murphy*..... 591
10. *Notice of final settlement.*—On the final settlement of an administrator's accounts under the act of 1854, (Session Acts 1853-4,

## EXECUTORS AND ADMINISTRATORS—CONTINUED.

- p. 24.) the same notice must be given as in case of final settlements under section 1805 of the Code ; and if the day appointed in the notice happen to fall on Sunday, the court has no authority to proceed with the settlement on the next day.—*McRee v. McRee*..... 165

## FRAUD.

1. *What constitutes fraud.*—A false representation of a material fact by the vendor, though not known by him at the time to be false, may constitute a fraud on the purchaser —*Kelly's Heirs v. Allen*..... 663
  2. *Retention of possession by vendor as evidence of fraud.*—The retention of the possession of personal property, by the grantor in a deed of trust for the benefit of creditors, after the property has been sold at public auction by the trustee pursuant to the terms of the deed, is not presumptive evidence of fraud.—*Wyatt v. Stewart*..... 716
- See, also, CHANCERY, 3, 17–21.

## FRAUDS, STATUTE OF.

1. *Guaranty of note held within statute of frauds.*—A guaranty endorsed on a promissory note, then past due, in these words, "I guaranty the payment of the within note by the 1st January, 1857," dated October 1st, 1853, is a "promise to answer for the debt, default, or miscarriage of another," within the meaning of section 1551 of the Code.—*Rigby v. Norwood*..... 129
2. *Requisitions of statute of frauds as to written contracts.*—A contract within the statute of frauds, (Code, § 1551,) to be valid, must not only be in writing, subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing, but must also express the consideration : section 2278, which makes written contracts, when the foundation of the suit, presumptive evidence of a consideration, does not apply to contracts within section 1551..... 129
3. *Sufficiency of complaint on contract within statute of frauds.*—In declaring on a contract within the statute of frauds, it is not necessary that the complaint should show a compliance with the requisitions of the statute..... 129

## FRAUDULENT CONVEYANCES.

See, DEEDS, 6–9.

## GARNISHMENT.

See, ATTACHMENT, 7.

## GIFT.

See, DEEDS, 1.

GUARANTY.

See, FRAUDS, STATUTE OF, 1.

GUARDIAN AND WARD.

1. *Authority of guardian by nature.*—A father has, as natural guardian of his infant child, no authority over the estate or effects of the child.—*Nelson v. Goree's Adm'r*..... 565
2. *Same.*—A father has no authority, as guardian by nature of his infant child, to receive money or slaves belonging to the child ; and if he receives such money or slaves, the chancery court will interpose, on a proper application, and require him to give bond with surety for the faithful discharge of his duties as guardian.—*Alston v. Alston*..... 15
3. *Validity of guardian's bond.*—Prior to the passage of the act of 1843, (Clay's Digest, 272, § 26,) the orphans' court had no authority to appoint a guardian of a child who had a living father ; consequently, a bond taken by that court, prior to the passage of the act of 1843, from a father who was appointed guardian of one of his infant children, is inoperative as a statutory bond ; and to render it valid as a common-law bond, it must be supported by a consideration..... 15
4. *Consideration of common-law bond of guardian.*—If a father, having been appointed without authority guardian of his infant son, and having thereupon executed a bond for the faithful discharge of his duties as such guardian, by virtue of such bond receives money or property belonging to the child, which he would otherwise have had no authority to receive, this constitutes a sufficient consideration to support the bond at common law..... 15
5. *Condition of guardian's bond.*—The fact that a guardian's bond is conditioned for his faithful performance of the "duties of guardian to the said ward," does not show that the guardianship is restricted to the person of the infant... 15
6. *Liability of guardian and his sureties.*—Where a guardian has received a legacy for his ward from the testator's executor, including a portion of the proceeds of a sale of lands by the executor, neither he nor his sureties can avoid liability therefor to the ward, by setting up the invalidity of the executor's appointment, or his want of authority to make the sale..... 15
7. *When statute of limitations begins to run as between guardian and ward.*—The statute of limitations does not commence to run against a ward, seeking a settlement in equity of his guardian's accounts, until the termination of the guardianship..... 15
8. *Commissions of guardian on receipts.*—Under the provisions of the Code, (§§ 2039, 1825,) a guardian is not entitled, on settlement of his accounts, to more than two and-a-half per cent. commissions on the amount of his receipts.—*Allen v. Martin*... 442
9. *Commissions on disbursements.*—A guardian is not entitled to commissions on the amount of money which is ascertained on final



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- settlement to be in his hands, and for which a decree is rendered in favor of his ward; that not being a disbursement..... 442
- See, also, CHANCERY, 25.

## HUSBAND AND WIFE.

1. *Husband's rights to emblements of wife's separate estate.*—On the death of the husband before the maturity of the crop planted by him on the wife's lands, and cultivated with the slaves belonging to her separate statutory estate, his administrator is entitled, as against the surviving wife, to the proceeds of such crop.—*Bennett v. Bennett*..... 53
2. *Husband's rights in wife's real estate.*—Under the laws of Mississippi, (Hutchinson's Miss. Code, 496–8,) the husband becomes tenant by the curtesy in lands conveyed to his wife during coverture, on the birth of issue and subsequent death of the wife.—*Nelson v. Goree*..... 565
3. *Wife's interest as distributee in estate of deceased husband.*—In estimating a widow's distributive interest in the estate of her deceased husband, (Code, § § 1991–92,) property secured to her sole and separate use under the provisions of her father's will is not to be considered as a part of her separate statutory estate; *secus*, as to slaves received by her under the allotment of the commissioners appointed to divide her father's estate, in payment of a sum of money which he held as her trustee under the will of her grandmother, and which was not bequeathed to her sole and separate use.—*Huckabee v. Andrews*..... 646
4. *Separate estate in wife created by parol.*—It is now the settled law of this State, that a separate estate in a married woman may be created by a parol gift of slaves, consummated by delivery. *Paulk v. Wolfe, Gillespie & Co*..... 541
5. *Bequest construed not to create separate estate in wife.*—Where a testatrix devised and bequeathed one-fourth part of her entire estate to each of her sons and sons-in-law, as trustee, “upon the following uses and trusts”—viz., to the first, “that he shall take possession of the same at my death, and have and hold it *for the sole use, benefit and behoof* of his five children;” to the second, “that he shall take possession of the same at my death, and have and hold it *for the sole proper benefit, use and advantage* of his six children;” to the third, “that he shall take possession of the same at my death, and have and hold it *to the only proper use, benefit and advantage* of his three youngest children;” and to the fourth, “that he shall take possession of the same at my death, and have and hold it *to the only proper use, benefit and advantage* of his children.”—*held*, that a grand-daughter who claimed under the second clause, and who was unmarried at the death of the testatrix, did not take a separate estate in the property bequeathed to her.—*Huckabee's Adm'r v. Andrews*.. 646
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- An averment in a bill in chancery, that a married woman holds property "to her sole and separate use," shows that her estate was created by contract, and not by statute.—*Cowles and Wife v. Morgan*..... 535
7. *Power of wife to charge statutory separate estate*.—Whether the wife has power to charge her statutory separate estate with the payment of any other debts than those specified in section 1987 of the Code—"this question," the court say, "we leave open and undecided, and when it shall hereafter arise, we will not regard ourselves as trammelled in its investigation by the incidental remark in *Durden v. McWilliams*, 31 Ala. 438."..... 535
8. *Power of wife to charge separate estate created by contract*.—A promissory note, executed by the wife during coverture, jointly with her husband, is a charge on her separate estate created by contract ..... 535
9. *Same*.—In the view of a court of equity, a married woman has the same power over her separate estate, created by contract, as if she were a feme sole, and may transfer or dispose of it at pleasure.—*Paulk v. Wolfe, Gillespie & Co.*..... 541
10. *Conveyance of wife's separate estate under act of 1850*.—If a married woman, while yet an infant, joins with her husband in a conveyance of her separate statutory estate under the act of 1850, (Session Acts 1849-50, p. 63,) the deed is voidable as to her; and a bill in equity, filed within a reasonable time after attaining her majority, is an appropriate mode of avoiding it. *Greenwood v. Coleman*..... 150
11. *When action lies against wife's administrator for supplies furnished to family*.—An action at law does not lie against the administrator of the deceased wife, to charge her separate estate with the payment of articles of "comfort and support of the household," (Code, § 1987,) furnished during the coverture. *Rodgers v. Brazeale*..... 512
12. *Validity of secret marriage-settlement*.—A marriage-settlement, secretly executed by a widow two days before her intended second marriage, without the knowledge of her intended husband, conveying her property to her separate use during her life, with remainder to her children, cannot be held fraudulent as against the husband's marital rights, in a controversy between him and the children, when it appears that, at the time the settlement was executed, the widow was pregnant by her intended husband.—*Anonymous*..... 430
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- own name, and that the purchase-money was afterwards paid by the wife, as his executrix, out of her distributive share. *Reaves v. Garrett*..... 558
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15. *Validity of grant of administration to feme covert.*—Under the statutes of this State, (Code, §§ 1660, 1673, 1683,) as at common law, administration may be granted to a married woman, if her husband consent to her appointment; and when the validity of her administration is collaterally assailed, her husband's consent will be presumed.—*English v. McNair*..... 40
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2. *Title to Indian reservation.*—Although the treaty itself establishes the existence and extent of the right which the beneficiaries take in the reservation thereby secured to them, yet the title to the particular lands to which each was entitled is conveyed by the patent subsequently issued..... 288
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- able as a set-off in an action brought by the administrator.  
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2. *Same.*—If any surplus remains in the hands of the administrator of an insolvent estate, after paying in full all the claims of creditors which were filed and verified within the time prescribed by the statute, (Code, § 1847,) the distributees of the estate are entitled to it, in preference to creditors whose claims were rejected because not properly filed and verified.—Puryear v. Puryear..... 555
3. *Sufficiency of affidavit verifying claim.*—An affidavit of the creditor himself, or of a third person, to the effect "that the annexed account is just and correct, to the best of his knowledge and belief," without more, is not a sufficient verification of a claim against an insolvent estate.—Dennis v. Coker's Adm'r.... 611
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5. *When administrator of insolvent estate may sue.*—The administrator of an insolvent estate, whose intestate had an undivided half interest as tenant in common in a block of stores, may maintain a bill in equity against the lessee of one of the stores, to restrain an improper sub-letting, which would impair the value of the property, and diminish the amount of the rents. Parkman v. Aicardi & Tool..... 393

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1. *When interpleader lies at law.*—In an action by the husband's administrator against his commission-merchants, to recover the proceeds of cotton shipped by the husband and sold in his lifetime, the defendants cannot, under section 2144 of the Code, ask the substitution of the wife's personal representative and distributee as a defendant in their stead; and although a different rule might possibly prevail, as to the proceeds of cotton received by the defendants after the husband's death, and sold by agreement between the respective representatives of the husband and wife; yet, if the action is brought to recover the entire proceeds of both sales, there can be no interpleader at all, since it is not permissible to divide the action into two distinct suits. Nelson v. Goree..... 565
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JOINT TENANTS, AND TENANTS IN COMMON.

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- agrees to receive as compensation a portion of the specific products, creates a tenancy in common between them in such products.—*Williams v. Nolen*..... 167
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1. *Rule of construction of judgments and orders of court*.—The general rule of construction, applicable to statutes, contracts and wills, which requires that effect should, if possible, be given to every word and clause, applies with peculiar force to the judgments and orders of courts of record.—*Ex parte Beavers*..... 71
2. *Conclusiveness and effect as evidence of interlocutory probate decree*. In a proceeding before the probate court for the settlement of a guardian's accounts, the auditing and stating of the account by the judge, by which a balance is ascertained against the guardian, is but the interlocutory ascertainment of a fact preliminary to a decree, and is not evidence against the ward, in a subsequent chancery suit, when it appears that, before the rendition of a final decree, the proceeding was voluntarily dismissed at his instance.—*Capell v. Landano*..... 135
3. *Conclusiveness of judgment*.—Where a petition for the *supersedeas* of an execution is filed by one of the defendants in the judgment, who was the surety of his co-defendant, setting up a contract between his co-defendant and the plaintiff, to the effect that an account held by the former on the latter, equal to the amount due on the judgment, should be credited on the judgment,—the judgment of the court, dismissing the *supersedeas*, is conclusive on the petitioner, in a subsequent action on the account, as to the making of the alleged contract, but is not *prima facie* conclusive against the correctness of the account. *Saltmarsh v. Bower & Co.*..... 613
4. *Same*.—A judgment recovered against principal and agent, by the owner of certain personal property, which the agent had tortiously taken under a contract with his principal, is conclusive on the principal, as to the title of the property, in a subsequent action brought against him by the agent on an implied promise of indemnity against damages in the execution of the agency.—*Moore v. Appleton*..... 147
5. *Effect of recitals of record as evidence*.—When a transcript, showing the proceedings had on a petition for the *supersedeas* of an execution, is offered in evidence in a subsequent suit, the petition for the *supersedeas*, though admissible in evidence as a part of the record, is not competent evidence of the facts stated in it.—*Saltmarsh v. Bower & Co.*..... 613
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7. *Form of decree directing application of surplus proceeds of wife's separate estate, after payment of charge*.—Where a sale of the wife's separate estate created by contract, for the satisfaction of a charge created by her, is ordered by the chancery court, the decree should direct the surplus of the proceeds of sale, after satisfaction of the complainant's debt, to be paid to her alone, and not to her and her husband; but the appellate court, while reversing the chancellor's decree for an error in this respect, will itself render the proper decree.—*Cowles v. Morgan*. . . . 535
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1. *When imputed to party*.—Equity will not impute laches to a party, on account of his failure to institute judicial proceedings, until it is possible for him to institute a suit in which a decree might be rendered concluding the parties interested adversely to him; as where he seeks the reformation of a deed, and the only parties adversely interested cannot be ascertained until the death of a person having a prior life estate.—*Shackelford v. Bullock*. . . . 418
2. *When applicable to bill to enforce vendor's lien*.—A bill in equity, to enforce a vendor's lien for the unpaid purchase-money of land, cannot be considered a stale demand, when filed within less than twenty years after the sale.—*Relfe v. Relfe*. . . . . 500
3. *In making defense to note*.—The doctrine of laches, as applied in equity to bills for the enforcement of stale demands, is not applicable to a case in which a party seeks to establish a defense, by way of equitable set-off, against an action at law on a note given for the purchase-money of land.—*Kelly v. Allen*. . . . . 663

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1. *When equity will restrain lessee from sub-letting premises*.—A court of equity will restrain the lessee of a store, which had been rented and used by him as a drug-store, from sub-letting the premises to another, to be used for retailing spirituous liquors, when it appears that, although the contract of lease did not restrict the use of the house to any particular business, the lessee fraudulently applied for a renewal of his lease in his own name, after having agreed to sub-let the house to a licensed retailer, because he knew that the landlord would not lease the premises for that purpose.—*Parkman v. Aicardi & Tool*. . . . . 393
2. *Estoppel against tenant by acknowledgment of title in another*. A purchaser of land, who is in possession under a bond for titles executed by his vendor, and who afterwards acknowledges the



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validity of a third person's title, obtained by contract with his vendor, and consummated by patent from the United States, is not thereby estopped from setting up his own equitable title against such third person, when it appears that his acknowledgment was made under a misapprehension as to the conclusiveness of the patent against his superior equity.—*Pearce v. Nix*..... 183

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2. *Who take as “children.”*—Under a residuary bequest to “the children of my brother Richard,” children born after the testator's death take nothing:..... 208
3. *Validity of condition in restraint of marriage annexed to legacy*. A condition or limitation in restraint of the marriage of a widow, when annexed to a devise or bequest by her husband, is valid.—*Vaughn v. Lovejoy*..... 437
4. *Precatory words*.—The words, “But, should my said husband” (who was made sole residuary legatee) “die without issue of his body, *it is my wish and will he shall give* all of said property to R.,” create a precatory trust in favor of R.—*McRee v. Means*, 349
5. *Repugnancy*.—It is a settled principle of law, that an absolute power of disposition or alienation in the first taker defeats a limitation over by way of executory devise; but this principle does not invalidate a remainder, by way of executory devise, limited upon the death without issue of his body of the first taker, to whom the property was bequeathed, “to have and to hold to him, his heirs and assigns forever, to his use, behoof and benefit, in fee simple.”..... 349
6. *Enlargement of life estate into fee by implication*.—The established doctrine, that a charge for the payment of debts or legacies, on the person of a devisee whose estate is undefined, enlarges his estate into a fee by implication, does not apply to a residuary bequest of the “balance” of the testator's property after payment of a legacy in money to another; the payment of the legacy in money being a charge on the estate, and not on the person of the residuary legatee..... 349
7. *Remoteness*.—The word *remainder*, as used in section 1302 of the Code, includes executory devises; consequently, an executory devise, limited to take effect on the death of the first taker “without issue of his body,” whatever might have been its effect at common law, is not void for remoteness under the Code, 349
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- real and personal, to be equally divided between my daughter, Louisa A. Mason, and Franklin S. Pate, who are my true and lawful heirs ;" and "I will and desire the property which my daughter obtains from this my will, *at her death to descend to her bodily heirs,*"—would, under the law existing in this State prior to the adoption of the Code, vest the absolute title to the property in the first taker ; but, under the provisions of the Code, (§§ 1302, 1304, 1299,) vests only a life estate in the first taker. *Mason v. Pate's Executor*..... 379
9. *Respective rights of tenant for life and remainder-man ; questions of jurisdiction and practice.*—Where money is bequeathed to one person for life, with remainder to another, the probate court has no power to direct its payment to the tenant for life, on his execution of a refunding bond ; but should leave him to seek redress in chancery, where the proper practice is to allow him to take the money, on the execution of a suitable bond, and, in the event of his failure to do so, to lend it out on interest, and pay the interest to him annually..... 379
10. *Bequest construed not to create separate estate in wife.*—Where a testatrix devised and bequeathed one-fourth part of her entire estate to each of her sons and sons-in-law, as trustee, "upon the following uses and trusts"—viz., to the first, "that he shall take possession of the same at my death, and have and hold it *for the sole use, benefit and behoof* of his five children ;" to the second, "that he shall take possession of the same at my death, and have and hold it *for the sole proper benefit, use and advantage* of his six children ;" to the third, "that he shall take possession of the same at my death, and have and hold it *to the only proper use, benefit and advantage* of his three youngest children ;" and to the fourth, "that he shall take possession of the same at my death, and have and hold it *to the only proper use, benefit and advantage* of his children ;"—held, that a grand-daughter who claimed under the second clause, and who was unmarried at the death of the testatrix, did not take a separate estate in the property bequeathed to her.—*Huckabee's Adm'r v. Andrews*.. 646
11. *Election by legatee.*—Where slaves belonging to the wife's separate estate, together with other property, are bequeathed by her husband to her, during life or widowhood, with remainder to another, she cannot take both under and against the will, but will be compelled to elect.—*Reaves v. Garrett's Adm'r*.... 558
12. *What constitutes election.*—In such case, an election to take under the will will not be implied from the facts, that the widow propounded her husband's will for probate, qualified as executrix, acted in that capacity for about fifteen months, returned the slaves in her inventory of the estate, charged herself in an annual settlement with their appraised value, kept possession of all the property until her resignation as executrix,

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1. *Conflicting liens of attachment at law and equitable writ of seizure.*  
If a sheriff, having in his hands an attachment at law, receives a writ of seizure issued by the chancery court, before he has levied the attachment, he can only execute the chancery process, unless he can find property not embraced in the writ of seizure, on which to levy the attachment.—*Read & Co. v. Sprague & McGown*..... 101
2. *Conflicting liens of judgment and mortgage.*—A stay of execution on a judgment, by order of the plaintiff, is constructively fraudulent as against a *bona-fide* creditor, who, during the suspension, acquires a mortgage or deed of trust on the debtor's lands, to secure an antecedent debt; and the lien of the judgment, in such case, will be postponed to the mortgage or deed of trust. (Overruling *Doe d. Leverich v. Bates*, 6 Ala. 480.)—*Sanford v. Ogden, Ferguson & Co.*..... 118

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2. *When statute runs against infant remainder-man.*—The statute of limitations is no defense to a bill filed by a remainder-man, against the grantor in a voluntary conveyance, seeking a recovery of the slaves conveyed, together with an account of their hire and profits, when it appears that the grantor set up no adverse possession during the life of the first taker, that the remainder-man was an infant when his right accrued, and that the bill was filed within three years (Code, § 2486) after he had attained his majority.—*Greenwood v. Coleman*..... 150
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5. *Prescriptive easement.*—In an action to recover damages for overflowing plaintiff's lands by the formation of a sand-bank in a stream, caused by an accumulation of the sand which was



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- washed down into the stream through a ditch dug by defendant, a plea, averring that the ditch had been dug and used by defendant for a period of ten or twenty years, presents no defense; for, although a right to an easement on another's lands may be acquired by adverse enjoyment, for the period which, under the statute of limitations, bars a right of entry on land; yet the presumed right is never allowed an extent beyond the adverse user, and the mere use of the ditch for ten or twenty years does not show any consequential injury to the plaintiff's lands for the same length of time.—*Roundtree v. Brantley*..... 544
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## NEW TRIAL.

1. *Construction of order granting new trial.*—On motion for a new trial, an order in these words, viz., "It is considered that said motion be granted, upon the payment of all the costs in the case, and the costs of this motion, within ninety days; for which let execution issue,"—is an absolute, unconditional grant of a new trial.—*Ex parte Beavers*..... 71
2. *What constitutes payment of costs in performance of condition.* Under an order granting a new trial, "on the sole condition that the plaintiff pay all costs in four months," nothing but an actual payment in money, within the prescribed time, can be deemed a compliance with the condition, unless the defendant consents to receive something else in satisfaction of the costs. *Screws v. Upshaw*..... 496

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2. *Nonsuit on verdict for plaintiff for less than \$50.*—Section 2365 of the Code, which requires the plaintiff to be nonsuited, on a verdict in his favor for an amount less than that of which the court has jurisdiction, unless he makes the affidavit prescribed by that section, applies only to actions *ex contractu*, and does not include an action of trover. (A. J. WALKER, C. J., *dissenting*.) *King v. Parmer*..... 416

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3. *Service of writ on partners.*—Where the summons describes the two defendants as late partners, but the complaint contains no such description or averment; and the summons is executed on but one of them, who alone appears and pleads, the rendition of judgment against both is unauthorized.—*Davidson & Brady v. Street & Ferguson*..... 125
4. *Levy of fi. fa. against partner individually on partnership effects.* It is settled in this State, that a sheriff, having in his hands an execution against one member of a partnership, may levy it on that partner's undivided interest in the partnership effects, and, for his own protection, may take the goods into his exclusive possession.—*Andrews v. Keith*..... 722
5. *Mode of stating partnership accounts.*—In stating the accounts of an equal partnership between three partners, under a bill filed by two against the third, the latter being the sole active manager of the business, the profit and loss account should be first adjusted, by ascertaining the gross income and expenses of the partnership, and striking a balance between the two sums; and a separate account with each partner should then be stated, for the purpose of apportioning the profits, or equalizing the losses: a simple debtor and creditor account, between the complainants on one side and the defendant on the other, is incorrect and erroneous.—*Collins & Langworthy v. Owens*.. 66

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1. *Misjoinder of parties plaintiff.*—Where the entire interest in cattle, belonging to two joint owners or tenants in common, has been sold by the sheriff under execution against one of them, at a place not authorized by law, they cannot unite in an action on the sheriff's official bond against him and his sureties; the remedy of one being an action on the case, and that of the other trespass or trover.—*Sheppard v. Shelton*..... 652

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2. *In action on contract within statute of frauds.*—In declaring on a contract within the statute of frauds, it is not necessary that the complaint should show a compliance with the requisitions of the statute.—*Rigby v. Norwood*..... 129
3. *In action against husband and wife.*—In an action against husband and wife, seeking to charge the wife's separate estate with "articles of comfort and support of the household," (Code, § 1987,) the complaint must aver that the articles furnished were



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4. *Averment of breach*.—In action by an agent against his principal, on an implied promise of indemnity against losses sustained in the execution of the agency, *held*, on the authority of the former decision in the same case, (*Moore v. Appleton*, 26 Ala. 633,) that an allegation in the complaint, that said defendant had notice of the losses and damages sustained by the plaintiff, set forth in the declaration, and failed to pay the same, was a sufficient averment of a breach.—*Moore v. Appleton*..... 147

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6. *Waiver of objection to plea*.—In a criminal case, if issue is joined on a plea, and a trial is had thereon, without objection on the part of the State, the appellate court will not, at the instance of the State, treat such plea as a nullity.—*Nonemaker v. The State* 211
7. *Plea of former conviction*.—Under a plea of former conviction in a gaming case, if the record of the former conviction, and the parol evidence adduced in aid of it, fail to show conclusively the non-identity of the two cases, the court is not authorized to instruct the jury, that if they believe the evidence, they must find the prisoner guilty..... 211
8. *Error without injury in rulings on pleadings*.—The sustaining of a demurrer to a special plea, when the defendant had the benefit of the same facts under the general issue, is, at the most, error without injury.—*Rodgers v. Brazeale*..... 512
9. *Requisites of plea*.—A plea which professes to answer the entire complaint, but which presents no defense to one of the counts, is bad on demurrer; so also is a plea which states a legal conclusion, instead of facts..... 512
10. *Form of plea puis darrein continuance*.—A plea *puis darrein continuance*, pleaded in "short by consent," and stating facts which are sufficient to bar the further maintenance of the action, will not be held defective on demurrer, under the provisions of the Code, because it does not profess to be pleaded to the further maintenance of the action only, and not in bar of the entire action.—*Broughton v. Bradley*..... 694

## IV. DEMURRER.

11. *Specification of causes*.—A demurrer, which specifies the portion of the complaint to which it is interposed, but does not state or point out any ground of objection to it, is not a com-

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- pliance with the statute, (Code, § 2253,) and should be overruled.  
 Burns v. Mayor of Mobile..... 485  
 12. *Demurrer to amended complaint*.—When the original complaint has been amended, by the addition of another count, a demurrer to the amended complaint, for causes to which the original count is not obnoxious, may be overruled entirely.—Rodgers v. Brazeale..... 512

V. GENERAL PRACTICE.

13. *Peremptory call of docket*.—A civil cause, having been properly placed on the trial docket, may be peremptorily called at any time on or after the day for which its trial is set, and the defendant be required to state whether or not he has a defense to the action, although other preceding causes on the docket have not been called or disposed of.—Womack v. Bookman..... 38  
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1. *To whom tender must be made*.—Where the purchaser at execution sale has sold and conveyed the land to another person, who is in open possession under his purchase, a tender can only be made to the latter.—Camp v. Simon..... 126  
 2. *What constitutes tender*.—A mere proposition to pay is not, of itself, a valid tender : there must be an actual production of the money, or something to excuse the failure to produce it..... 126

ROADS.

1. *Constitutionality of statutes authorizing establishment of private roads*.—The several statutes of this State, authorizing the establishment of private roads across the lands of third persons, (Code, §§ 1187–88,) are unconstitutional, inasmuch as they authorize the taking of private property for other than public uses ; and the fact that such statutes have long been in existence is not a sufficient reason why the courts should not now declare them unconstitutional.—Sadler v. Langham..... 311  
 2. *Constitutionality of public road law*.—The public-road law of this State, in providing for the assessment of damages to the person through whose lands any road is opened, and securing the payment of such damages before the property is taken, (Code, §§ 1136–38,) meets the constitutional requisition that “just compensation be made” for private property taken for public use ; and when a public road has been changed or established by an order of the commissioners’ court, the appellate court can-

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- not revise the discretionary power vested in that tribunal, on the ground that its action was not for the public benefit.—Commissioners' Court of Lowndes Co. v. Bowie . . . . . 461
3. *When decision of commissioners' court is revisable.*—In determining the expediency of a proposed establishment or change of a public road, the commissioners' court exercises a quasi-legislative authority, and does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the county, the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair; and its decision on the question of expediency is not revisable in an appellate court. . . . . 461
4. *Jurisdiction of commissioners' court in establishment or change of public road.*—The jurisdiction of the commissioners' court, in the establishment or change of a public road, is dependent on these three things: 1st, an application to the court; 2d, thirty days' notice of the application, by advertisement at the court-house door and three other public places in the county; and, 3d, the location of the road within the county. . . . . 461
5. *Sufficiency of notice.*—It is not necessary that the record should affirmatively show by whom the notice was signed, nor what it contained, nor at what places it was posted up, nor how long it remained posted up: a simple recital in the record, that proof was made of the fact that thirty days' notice of the application had been given, by advertisement posted up at the court-house door and three other public places in the county, is sufficient. . 461
6. *Petition and pleadings.*—Although a petition is necessary, which should properly allege such a state of facts as would seem to make it expedient to grant the proposed change of road; yet a demurrer does not lie to the petition, on account of the supposed insufficiency of its allegations; and the overruling of such demurrer is, therefore, not revisable on error or appeal. . . . . 461
7. *Oath of jury.*—A recital in the report of the jury of viewers, that before acting under their commission they took a specified oath, which corresponds with the requisitions of the statute, is at least *prima-facie* evidence of the fact that they were so sworn. . . . . 461
8. *Waiver of objection to jurors.*—If the contestant is present in court when the jury of viewers is appointed, and also when their report is returned, and does not object to their competency, he cannot raise the objection in the appellate court, that the record describes them as "disinterested freeholders," instead of "householders." . . . . 461
9. *Report of jury, and action of court thereon.*—If the report of the jury of viewers is irregular, the court not only has authority, but it is its duty, to set aside the report, and appoint another jury, to consist of the same or other persons. . . . . 461
10. *Validity of order establishing road at costs of applicant.*—An order



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11. *Route of road determined by court and jury.*—Although the statute contemplates that the jury shall mark out the route of the road, yet it is the province of the court to direct the location as definitely as possible without an actual inspection of the ground; consequently, it is no objection to the order that it directs the jury to lay out the road along a certain section line, extending a specified number of feet on each side..... 461
12. *Who may resist establishment of public road.*—A person who lives within such a distance of a public road, as established under an order of the commissioners' court, that he or his slaves may be compelled to work on it, has not such an interest as authorizes him to sue out a *certiorari*, for the purpose of revising the proceedings of the commissioners' court before an appellate tribunal.—*Parnell v. Comm'r's' Court of Dallas County*..... 278
13. *Change of public road.*—Under the provisions of the Code, (§§ 1131, 1176,) a public road can only be lawfully changed by an order of the court of county commissioners, although a person who straightens such road through enclosures, or renders it more convenient for the public, is not liable to a criminal prosecution for a misdemeanor.—*James v. Hendree*..... 488

## SCHOOLS.

1. *Summary proceeding against defaulting superintendent.*—The 6th section of the 4th article of the school-law of 1856, (Session Acts 1855–6, p. 44,) which provides that, if a county superintendent fails to pay over according to law the money in his hands, "he shall be liable to the penalties set forth in section 382 of the Code of Alabama against treasurers who fail to pay over school-funds," does not authorize a summary remedy against him and the sureties on his bond.—*Underwood v. School Township Sixteen*..... 29
2. *Rights and duties of trustees.*—The 5th section of the 4th article of said act, requiring the county superintendent to pay over the funds in his hands on the application of the trustees, "*provided they have discharged the duties, and at the time appointed, as prescribed in article 2, section 13, and not otherwise,*" imposes no disability on trustees who have duly discharged all their duties, an account of the failure of their predecessors to comply with all the requirements of the law..... 29

## SET-OFF.

1. *What demand is available as set-off.*—In an action on the common money counts, to recover money which was taken from plaintiff's possession, when arrested on a charge of having carried off

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- defendant's slave with intent to convert her to his own use, and which was handed to defendant by the agent who made the arrest, the expenses actually incurred by defendant in regaining his slave are not available as a set-off, (Code, § 2240.)—Walker v. McCoy..... 659
2. *Same*.—A claim against an insolvent estate, which has not been filed and verified within the time required by law, is not available as a set-off in an action brought by the administrator. Bell's Adm'r v. Andrews..... 538
3. *Waiver of right of set-off by contract and breach thereof*.—Defendant having a judgment against plaintiff and another, (the latter as surety of plaintiff,) and plaintiff having at the same time an unsatisfied account against defendant; an agreement between them that the account should be credited on the judgment, coupled with the transfer of the account by plaintiff to his surety, in order that it might be so credited for his protection, and the subsequent breach of the agreement by defendant, in coercing satisfaction of the entire judgment out of the surety, —do not prevent defendant, when sued on the account by plaintiff, for the use of his surety, from pleading as a set-off any other demand due to him by plaintiff.—Saltmarsh v. Bower & Co. 613
4. *Costs on successful plea of set-off*.—Where a set-off is pleaded and controverted, and the witness by whom it is established is sought to be impeached, the defendant is entitled to recover (Code, § 2378) the costs of all the witnesses, without regard to their number, who were summoned for the purpose of impeaching or sustaining said witness, and examined on the trial.—Fuller v. Hunter..... 56

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## EXECUTION.

## SLAVES, AND PERSONS OF COLOR.

1. *Who may institute suit for freedom*.—Section 2049 of the Code, respecting suits for freedom, is not confined in its operation to persons of African blood, but includes all persons who are claimed and held as slaves.—Farrelly v. Maria Louisa..... 284
2. *Proof of status of petitioner*.—In such action, the fact that the petitioner's mother, before and about the time of his birth, went at large, was treated and dealt with as a free person, was not under the control of any other person, and conducted herself as a free person, is competent evidence for the petitioner..... 284
3. *Competency of mulatto as witness*.—A person whose paternal grandmother was the daughter of two mulattoes, each of whom was the child of a full-blooded negro and a white person, is not (Code, § 2276) a competent witness against a white person. Heath v. The State..... 250

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See, CHANCERY, 22, 36.

## SURETIES.

1. *When action for contribution accrues.*—A surety, against whom a judgment is recovered, or whose liability is otherwise fixed and matured, may pay the debt immediately, without waiting for the issue of execution; and his right of action against his co-surety for contribution accrues at the time of such payment, without reference to the time when the original contract matured.—*Stallworth v. Preslar*..... 505
2. *When action for contribution lies.*—Conceding that one surety cannot maintain an action for contribution against his co-surety until he has paid a greater sum than the latter remains liable to pay; yet, if he has discharged and satisfied the entire debt, though by the payment of less than one-half its amount, he may recover contribution from his co-surety..... 505
3. *Same.*—On the dissolution of an injunction, either surety on the bond has a right to pay off the amount due, without waiting for the issue of an execution, and to claim contribution from his co-surety; and his right of action is not dependent on the insolvency of their principal.—*Buckner v. Stewart*..... 529
4. *Discharge of sureties on appeal bond by agreement between parties to appeal.*—An agreement between the parties to an appeal pending in the supreme court, entered into without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified amount, at the costs of the appellant, and that the property in controversy should belong to him, discharges the sureties from liability on their bond.—*Johnson v. Flint*..... 673

## TENANTS IN COMMON.

See, JOINT TENANTS, &c.

## TRESPASS.

1. *What title will support action.*—Proof of actual possession at the time of the trespass is sufficient to sustain this action, against a mere wrongdoer who is not the real owner of the chattel.—*Tarry v. Brown*..... 159
2. *Proof of title.*—In trespass against several, any evidence which shows title in one of them, under whom the others acted, is relevant and admissible for the defendants; and any evidence which tends to disprove such title, is competent for the plaintiff in rebuttal..... 159
3. *Trespass ab initio by abuse of legal process.*—If a sheriff sells the entire interest in a chattel belonging to two joint owners or tenants in common, under execution against one of them, he is liable as a trespasser *ab initio* at the suit of the other, but not at the joint suit of both.—*Sheppard v. Shelton*..... 652



## TRIAL OF RIGHT OF PROPERTY.

1. *Commencement of action*.—The commencement of a statutory claim suit is not the issue of the execution, nor its levy, but the making of the affidavit and the giving of the bond by the claimant.—*McAdams v. Beard & Henderson*..... 478
2. *Security for costs*.—A trial of the right of property is not within either the letter or the spirit of section 2396 of the Code, which requires security for the costs in actions commenced by or for the use of a non-resident..... 478

## TROVER.

1. *When action lies between tenants in common*.—One tenant in common cannot maintain an action of trover against his cotenant, without proof that the common property has been destroyed, sold, or otherwise disposed of by the defendant..... 167
2. *When action lies against purchaser on rescission of contract*.—On the refusal of the vendor to receive a slave, when tendered back by the purchaser, in a case which authorizes a rescission of the contract on the part of the latter, the purchaser is not bound to abandon the slave, but may retain it as the bailee of the vendor; and the fact that he permits the slave, while thus remaining in his possession, to work voluntarily for him, does not render him liable in trover at the suit of the vendor.—*Rand v. Oxford*..... 474
3. *When action lies in favor of vendor on rescission of contract*.—When a chattel has been taken from the possession of the purchaser by a third person, under a *bona fide* claim of title, and the contract of sale has been afterwards rescinded by agreement between the purchaser and his vendor, the vendor may maintain an action against such third person for the conversion.—*Williamson v. Sammons*..... 691

## TRUSTS.

1. *Continuance of trustee's title*.—Where slaves are conveyed by deed to a trustee, in trust for the grantor's wife for life, with remainder to her children living at her death, and, in default of children, then to descend and revert to the grantor, the title of the trustee ceases on the death of the wife, and the children then living take a legal estate.—*Greenwood v. Coleman*..... 150
2. *Trust implied and enforced against self-constituted agent and guardian*.—Where the defendant undertook to become the guardian of his infant sister-in-law, and to bid in for her, at the sale of the personal property belonging to the estate of her deceased father, certain slaves to which she had a family attachment; and, in pursuance of his promise, but before taking out letters of guardianship, bought the slaves at the sale, professedly for the infant, and thereby obtained them at an inadequate price,—*held*, that these facts establish a trust, at the election of the infant,

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- which a court of equity will enforce in her favor.—Belcher v. Sanders..... 9
3. *Trust implied against holder of legal title.*—A patent being issued to a Choctaw Indian “and his heirs,” for all the lands to which he and his several children were entitled as their reservations under the treaty of 1830, a court of equity will hold the legal title subject to the equitable rights secured to the children by the treaty.—Wilson v. Wall and Wife..... 288
4. *When enforced against purchaser for valuable consideration.*—A purchaser from a Choctaw Indian, knowing that his vendor claimed the land as his reservation under the treaty of 1830, is not entitled, as against the children of his vendor, to protection as a purchaser for valuable consideration without notice..... 288
5. *Trust not implied against husband, in favor of wife.*—An agreement on the part of the husband, to pay for certain slaves, purchased by him at the administrator's sale of the estate of his wife's deceased father, out of his wife's distributive share of the estate, which constituted a part of her separate estate under the statutes of this State, does not constitute him a trustee for his wife, when it appears that he took the title in his own name, and that the purchase-money was afterwards paid by the wife, as his executrix, out of her distributive share. Reaves v. Garrett..... 558
6. *Precatory trust.*—The words, “But, should my said husband” (who was made sole residuary legatee) “die without issue of his body, it is my wish and will he shall give all of said property to R.,” create a precatory trust in favor of R.—McRee's Adm'rs v. Means..... 349
7. *When mortgage sale will be set aside in equity, on account of trustee's misconduct.*—The fact that a trustee, in making a sale of property under mortgage or deed of trust, knew that the purchaser was bidding for the mortgagee, is not sufficient to induce a court of equity to set aside the sale.—Lucas v. Oliver.... 626
8. *Statute of uses and trusts construed.*—Section 1306 of the Code converts all titles and interests in lands into legal estates in the beneficiary, to the same extent as if the conveyance had been made directly to him, where the nominal title is vested in a naked trustee, who is not placed in possession, nor required to perform any duties, and where the instrument creating such nominal title declares a use, trust, or confidence for another; but it has no application to a conveyance, which, although it may declare a trust for the use of the grantor or of another person, charges the trustee with the control, management, or other active duties in regard to the trust property; nor does it apply to a conveyance of land, taken by a father in the name of his son, which recites that the purchase-money was paid by the father.—You v. Flinn..... 409

## VENDOR AND PURCHASER.

1. *Construction of executory contract of sale as to stipulations for covenants by vendor.*—A stipulation on the part of the vendors, in an executory contract of sale, that they will make, or cause to be made to the purchaser, “a good and sufficient deed or other conveyance or conveyances in the law for conveying and assuring” the property to the purchaser, “which deed or deeds shall contain the usual full covenants and warranty of title of the premises to the party of the second part, free and clear of all liens and incumbrances whatsoever,”—binds them to deliver deeds containing covenants equivalent, in extent and operation, to the covenants of seizin, freedom from incumbrances, and general warranty.—*McKleroy v. Tulane*..... 78
2. *When contract of sale is complete.*—Upon the delivery to the purchaser of an article manufactured for him, and its acceptance by him, (if not sooner,) the contract of sale is complete, and the title to the article vests in the purchaser.—*Jemison v. Woodruff & Beach*..... 143
3. *When contract of sale is complete, and what constitutes valid modification.*—The rulings of the court in this case, in the matter of instructions to the jury, tested by the principles settled on a former appeal, (*Thomason v. Dill*, 30 Ala. 444,) and held correct. *Thomason v. Dill*..... 175
4. *When purchaser is entitled to abatement of price on account of deficiency in quantity of land.*—When the statements of the deed, as to the quantity of land conveyed, are mere matter of description, and there was no fraud on the part of the vendor, he is not bound to make good the deficiency, particularly if the sale was made in gross; and the purchaser, in such case, cannot claim an abatement of the purchase-money on account of the deficiency.—*Wright v. Wright*..... 194
5. *Right of rescission by purchaser.*—If a female slave is known to be with child at the time of her sale, an offer to rescind on the part of the purchaser, made after the birth and subsequent death of the child, cannot be assumed to have been made too late, unless the purchaser had a reasonable time and opportunity, after the discovery of the facts which justify the rescission, to return the property before the death of the child.—*Athey v. Olive*..... 511
6. *Rescission of contract by purchaser.*—After a contract of sale is complete, and the title to the article sold has vested in the purchaser, he cannot rescind or annul the contract, on account of the vendor's breach of warranty, or fraudulent representations as to the quality of the article, without placing or offering to place the vendor *in statu quo*..... 143
7. *Rights, duties and liabilities of purchaser on rescission of contract.* On the refusal of the vendor to receive a slave, when tendered back by the purchaser, in a case which authorizes a rescission of the contract on the part of the latter, the purchaser is not



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- bound to abandon the slave, but may retain it as the bailee of the vendor; and the fact that he permits the slave, while thus remaining in his possession, to work voluntarily for him, does not render him liable in trover at the suit of the vendor.—*Rand v. Oxford*..... 474
8. *How far fraud and breach of warranty constitute defense to action for purchase-money.*—In an action against the purchaser, to recover the price agreed to be paid for an article sold and delivered to him, he cannot, while he retains the article, and has not offered to rescind the contract, avoid the payment of the entire purchase-money, on the ground of fraud or breach of warranty, unless the article is altogether valueless..... 143
9. *Who is purchaser for valuable consideration without notice.*—A purchaser from a Choctaw Indian, knowing that his vendor claimed the land as a reservation under the treaty of 1830, is not entitled, as against the children of his vendor, to protection as a purchaser for valuable consideration without notice.—*Wilson v. Wall*..... 288
10. *When equity will rescind contract on account of fraud.*—A contract for the sale of the patent right to make, use and vend, within a specified territory, an improved kind of loom, will be rescinded in equity, on the timely application of the purchaser, on proof that the vendor, who was also the inventor, grossly misrepresented the capacity of the loom and his own success in selling and put it in operation; and that the purchaser, being ignorant of these matters, was induced by these misrepresentations to enter into the contract.—*Pierce v. Wilson*..... 596
11. *Waiver of right of rescission by laches and subsequent ratification.* Where the contract was made on the 8th June, 1853; and the vendor's representations respecting the subject of the sale—the patent right for an improvement in looms—related to its adaptedness to be worked by hand, and to be driven by machinery in factories; and the purchaser, having discovered the falsity of the former representations, proposed a rescission in November, 1853, which the vendor declined; and the purchaser afterwards made renewed efforts to obtain a model loom, of the size and description specified in the contract, and also endeavored to sell looms in the district of country embraced in his purchase, representing that they could be successfully worked by machinery in factories; and, having failed in all his efforts, filed his bill to rescind in February, 1856,—*held*, that there was nothing in these circumstances which amounted to a waiver or forfeiture of the right of rescission, which had been duly perfected by the offer to rescind in November, 1853..... 596
12. *When purchaser may come into equity, to obtain compensation, or abatement of purchase-money.*—A purchaser's remedy, on account of his vendor's misrepresentations respecting the boundaries of the land, being adequate and complete at law, either by an

## VENDOR AND PURCHASER—CONTINUED.

action for damages before the Code, or by plea of set-off under the Code to an action on the notes given for the purchase-money, he cannot, in the absence of some special equity, maintain a bill in chancery for compensation, or an abatement of the purchase-money; but the removal of the vendor from this State, and his subsequent death in a foreign State, where his estate has since been settled up and distributed, afford a special ground for equitable relief, in a case not governed by the Code.—*Kelly's Heirs v. Allen*..... 663

13. *Same*.—The doctrine is now well settled in this State, that a purchaser cannot come into equity, to obtain compensation, or an abatement of the purchase-money, on account of a deficiency in the quantity of the land, or the fraudulent misrepresentations of his vendor as to its quantity or quality, unless his bill also shows some other independent ground of equitable relief.—*Bell v. Thompson*..... 633

14. *Mode of computing damages to purchaser on account of misrepresentation of boundary lines*.—In computing the damages to which a purchaser is entitled, by way of compensation, or abatement of the purchase-money, on account of his vendor's falsely representing certain adjacent lands as included within the boundaries of the tract sold, the correct rule is to ascertain the average value, per acre, of the tract actually sold and conveyed, and what would have been its average value if it had included such adjacent lands; the difference between the two amounts being the measure of damages to which the purchaser is entitled.—*Kelly v. Allen*..... 663

## WARRANTY.

1. *Warranty of title on sale of personalty*.—In the absence of proof to the contrary, the law implies a warranty of title in the sale of a chattel.—*Williamson v. Sammons*..... 691
2. *What constitutes breach of warranty of mental soundness*.—If a slave is neither insane, nor idiotic, nor subject to any mental derangement which interferes with the natural operations of the mind, the mere fact that he has less mental capacity than is usually found among slaves does not constitute a breach of warranty of sound mind.—*Athey v. Olive*..... 711

## WILLS.

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## WITNESS.

1. *Competency of witness as affected by interest*.—The husband of a female distributee is not a competent witness against the validity of a will propounded for probate, when it is shown that, if the will were set aside, his wife would be entitled to a greater

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- share of the estate, than if it were held valid.—Walker v. Walker's Executor..... 469
2. *Competency of partner as witness.*—In an action against a partnership, by its firm name, (Code, § 2142,) to recover damages for the loss of a hired horse, a partner in the firm to which the horse was hired is not a competent witness for the defendants, to show that they did not transact business under the name by which they were sued.—Jemison, Ficklin & Co. v. Minor & Bizzell..... 33
3. *Competency of agent as witness for principal.*—In an action by a carrier to recover freight, the defense being set up that the cargo was damaged by his negligence, and that the defendant is entitled to recoup for such damages, the pilot who had charge of the flat-boat at the time of the accident, is a competent witness for the plaintiff, unless it is affirmatively shown that the same act of negligence on his part, which caused the damage to the defendant's goods, also made the pilot liable at the suit of the plaintiff.—Johnson v. Lightsey..... 169
4. *Competency of mulatto as witness.*—A person whose paternal grandmother was the daughter of two mulattoes, each of whom was the child of a full-blooded negro and a white person, is not (Code, § 2276) a competent witness against a white person. Heath v. The State..... 250
5. *Competency of vendor as witness for purchaser.*—In a statutory suit for freedom, the defendant's vendor is a competent witness for him, (Code, § 2302,) when it appears that he only sold and conveyed "his interest" in the petitioner as a slave.—Farrelly v. Maria Louisa..... 284











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